BEFORE THE NEW CAR DEALERS POLICY AND APPEALS BOARD

OF THE STATE OF CALIFORNIA

HOLIDAY FORD, a California corporation, Appellant, vs. DEPARTMENT OF MOTOR VEHICLES, Respondent.	)	File No. A-1-69
	)	Filed and Served: 5 September 1969

Time and Place of Hearing: August 13, 1969, 10:00 A.M.
350 McAllister Street
San Francisco, California

For Appellant: Keith F. Pritchard, Esq.

For Respondent: Honorable Thomas Lynch
Attorney General
Victor Sonenberg
Deputy Attorney General

FINAL ORDER

In the decision ordered January 10, 1969, by the Director of the Department of Motor Vehicles pursuant to Chapter 5, Division 3, Title 2, Government Code, it was found and determined that the appellant: (1) Entered into certain conditional sales contracts for the purchase of vehicles without including in a single document all of the agreements of the buyer and seller with respect to the total cost and terms of payment of the vehicles; (2) wrongfully and unlawfully retained money or a thing of value by failing to return said money or

thing of value to the depositor when a conditional sales contract was not executed; (3) caused advertisements to be published that were misleading and inaccurate in material particulars; (4) represented to a prospective purchaser that a vehicle was new when, in fact, it was a used vehicle; (5) included as an added cost to the selling price of vehicles amounts for licensing and transferring title of the vehicles, which amounts were not due to the State and when the amounts were not in fact paid by the dealer prior to such sale; (6) employed as a vehicle salesman one not licensed as a vehicle salesman; (7) wrongfully and unlawfully advertised that no down payment was required in connection with the sale of a vehicle, when, in fact, a down payment was required and the buyer was advised or induced to finance such down payment by a loan in addition to any other loan financing the remainder of the purchase price of the vehicle; (8) operated on the highways certain vehicles without properly displaying dealer's special plates; (9) knowingly filed with the department false certificates of non-delivery of vehicles; (10) wrongfully and unlawfully used dealer's reports of sale by failing to timely forward documents and fees to the department; (11) failed to affix the operating copy of the report of sale and the paper license plate to a certain vehicle at the time of delivery to a purchaser; (12) failed to give the department timely notice after transferring title to certain vehicles; (13) gave to the department dates of sale of certain vehicles other than

the true dates of sale; (14) filed with the department false certificates of non-operation of certain vehicles; and (15) reported to the department false first dates of operation for certain vehicles.

The penalty imposed by the department revoked the dealer's license, certificate and special plates; stayed the execution of the order of revocation; and placed the appellant on probation for a period of three years under the conditions that: (1) its license, certificate and special plates be suspended for a period of fifteen days from the date of the decision; (2) it employ and retain competent personnel and diligently and properly prepare and complete all of the necessary records required in the operation of its business and submit complete and accurate records and reports when and as required by the Department of Motor Vehicles; and (3) abide by all applicable laws and regulations. It was further ordered that the Director of the Department of Motor Vehicles may, in his discretion and without a hearing, vacate the stay order and impose said order of revocation should he determine upon evidence satisfactory to him that cause for disciplinary action has occurred during the probationary period.

The licensee appealed to the New Car Dealers Policy and Appeals Board pursuant to Chapter 5, Division 2, Vehicle Code. For reasons hereafter stated, we affirm the decision of the department in part and reverse in part.

The first question to be resolved is the proper scope of our review when we sit in our appellate capacity. We are persuaded that Section 3054 Vehicle Code compels the application of the independent judgment rule rather than the substantial evidence rule. We must, therefore, resolve conflicts in the evidence in our own minds and we may make our own determinations regarding the credibility of the witnesses whose testimony appears in the transcript of the administrative hearing. (Cf. C.E.B. Cal. Administrative Mandamus 5.73, 5.74.)

A major portion of the department's case against the appellant calls into question the proper interpretation of Section 2982(a) Civil Code. The department found, and the appellant does not dispute, that the conditional sales contracts entered into between appellant and purchasers of automobiles did not reflect the fact of a secondary loan in the single document; i. e., the fact that the purchasers independently contracted with loan companies for loans to provide funds sufficient to meet the dealer's requirements for a down payment was not shown in the conditional sales contract entered into by the dealer and the buyer. Appellant admitted and the evidence established that it assisted buyers in obtaining the secondary financing, but the evidence also established that appellant was not a party to the loan agreement reached by the buyer and the loan company.

The department interprets Section 2982(a) Civil Code as requiring the inclusion in the conditional sales contract of the fact that secondary financing was resorted to when the buyer was assisted or induced by the seller in obtaining such financing. The appellant argues that this section is ambiguous as it pertains to the setting forth of secondary financing; that the long-standing practices of the industry have been directly opposite to the interpretation now placed by the department; and that the department's failure to issue clarifying regulations precludes the department from pursuing this action.

We do not concern ourselves with the conduct of the industry in this respect nor the absence of clarifying regulations. Section 2982(a) of the Civil Code is not ambiguous as it pertains to the single document provision. Nowhere in this section is there any language which raises an inference of legislative intent to require that a loan made with or without the assistance or inducement of the seller be identified in the conditional sales contract as a loan from a third party to the buyer and there is no indication it was intended that the terms or conditions of that loan be so reflected in the conditional sales contract.

The secondary financing does not constitute an agreement "... with respect to the total cost..." of the vehicle. It has no bearing on the "...terms of payment for the motor vehicle". It is an independently contracted loan of the buyer

from a third party which enables the buyer to pay the seller the down payment required by the seller. The amount of the down payment is set forth in the single document, i.e., the conditional sales contract. Indeed, several of the buyers with whom appellant dealt arranged with the loan companies to obtain money used for purposes wholly unrelated to the transaction with appellant, e.g., consolidation of outstanding debts owed to various creditors of the buyer.

Furthermore, Section 2982(a) Civil Code designates very specifically what the conditional sales contract shall contain and nowhere in these designations is there any language which could be construed as relating to the secondary financing or terms thereof. In fact, the designations exclude the possibility of requiring the secondary financing and terms thereof to be shown in the conditional sales contract. Item 6 requires that there be included in the conditional sales contract "The amount of finance charge". By using the singular "charge", the Legislature's intent would appear to clearly limit the data required to be included in the document to the finance charge for the deferred balance under that contract, contrary to the department's contention. Moreover, the department's interpretation is ruled out by reference to Item 7, which specifically limits the finance charge referred to in Item 6, as the charge provided for in the contract between the buyer and the seller.

We cannot find any language in Section 2982(a) Civil Code reasonably susceptible to the interpretation given it by the

department. On the contrary, the language which the department reads into the section is in conflict with the language which was adopted by the Legislature. This is not a situation requring extrinsic aids in the construction of a statute. We find that the department has proceeded in a manner contrary to the law with reference to paragraph III of its decision and, therefore, we reverse the department on this issue.

Appellant initially contended that the department erroneously found appellant had violated Section 2981(f) Civil Code because that provision neither prohibited a specific action nor imposed a mandate of any kind or nature. Appellant argued that the provision was merely a definition, and, therefore, could not be violated. However, in oral argument before this board, appellant stated he had believed that the effective date of the 1968 amendment affecting Section 2981(f) Civil Code, preceded the occurrence of the transaction which gave rise to the department's charge. In 1968, the Legislature deleted from the pertinent provision of the section the language upon which the department relied in making its charge; namely, "which cash, property or thing of value shall be refundable to the buyer in the event a conditional sale contract is not executed, or if the property or thing of value traded cannot be returned, the cash value thereof". At the hearing before this board, appellant did not contend that the department's interpretation of the section was improper. Instead, in its reply brief and in oral

argument, appellant has taken the position that it had not violated the section because the contract in question had in fact been executed.

Appellant's most recent argument regarding execution of the contract is found to be without merit and, therefore, we affirm the findings in paragraph IV of the decision.

Appellant attacks paragraph V of the decision by taking the position that Section 11712(a) Vehicle Code, as it pertains to advertising, is unconstitutional in that it is vague, indefinite and uncertain, and, as a result thereof, it could not reasonably be determined in advance whether or not certain advertising would constitute a violation of that section. Appellant further argues that the finding in paragraph V is defective in that it fails to identify what actions of appellant are found to constitute a violation of Section 11713(a) Vehicle Code.

We reject the argument that Section 11713(a) Vehicle Code is unconstitutionally vague. The meaning of the terms "...misleading or inaccurate..." is not vague or ambiguous. (Cf. People ex Rel. Mosk v. National Research Company of California, 201 Cal. App. 2d 765). A statute designed to protect the public good must be upheld unless its nullity clearly, positively and unmistakably appears. (Lawton v. Board of Medical Examiners, 143 Cal App. 2d 256). What is misleading and inaccurate under any given set of circumstances is a question of fact and the essential test is whether the

public is likely to be deceived. It does not impose an undue burden upon the appellant to determine whether or not the members of the public observing its advertisements are likely to be deceived therefrom. It is charged with the responsibility of making such a determination prior to publishing the advertisement. The evidence established that the advertisements referred to in paragraph V were misleading, and the the director's findings in paragraph V are sustained.

Appellant's contention that paragraph V of the decision is not supported by specific findings and hence not valid is without merit. In Savelli v. Board of Medical Examiners, 229 Cal. App. 2d 124, the court said:

> "...Although administrative findings must conform to the statutes governing the particular board or agency, such findings are liberally construed and need not be stated with the formality required in judicial proceedings. (Swars v. Council of City of Vallejo, 33 Cal. 2d 867, 872, 206 P.2d 355; Taylor v. Bureau of Private Investigators, 128 Cal.App.2d 219, 229, 275 P.2d 579; Steele v. L. A. County Civil Service Comm., 166 Cal.App.2d 129, 136, 333 P.2d 171.) Under Government Code section 11518,[12] providing for the form and content of the decision of the administrative agency, the findings must be sufficient to enable the reviewing court to determine that the agency actually found necessary facts to support its determination of the issues. (Jones v. Maloney, 106 Cal.App.2d 80, 90-91, 234 P.2d 666.) Administrative findings may be general as long as they satisfy the dual requirements of making intelligent review possible and apprising the parties of the basis of the decision of the administrative agency. (Swars v. Council of City of Vallejo, supra. 33 Cal. 2d p. 873, 206 P.2d 355.) Accordingly, where such findings point out the specific ground upon which the agency has based its decision such a finding will suffice even though the reviewing court might prefer a more detailed statement of the grounds for the decision. (Webster v. Board of Dental Examiners, etc., 17 Cal.2d 534, 543-544, 110 P.2d 992.)

"*12 - 11518. The decision shall be in writing and shall contain findings of fact, a determination of the issues presented and the penalty, if any. The findings may be stated in the language of the pleadings or by reference thereto. Copies of the decision shall be delivered to the parties personally or sent to them by registered mail."

With reference to paragraph VI of the decision, we reverse because the finding that the appellant wrongfully and unlawfully represented to the buyer of the motor vehicle in question that is was a new vehicle is not supported by the weight of the evidence. All documents filed with the department by the appellant properly identified the vehicle as a used car at the time of the sale of the vehicle. The buyer testified that the mileage on the car at time of purchase was between 3000 and 3100 miles. The conditional sales contract noted certain body damage and a loose window. While the purchaser testified that he believed he was buying a new car rather than a used one, the other evidence outweighs this testimony. The department has not proven that there was a wrongful and unlawful representation to the buyer that the vehicle was new, and the department's finding in paragraph VI of the decision is reversed.

The department found in paragraph VIII of the decision that the appellant employed or delegated the duties of a vehicle salesman to one not licensed as such. It was further found that a salesman employed by the appellant advised Carol Snyder that he would share a portion of his commission with her if she referred customers to him. The salesman provided Carol Snyder with business cards. Carol Snyder sent a customer to

the salesman who purchased a car through him. Carol Snyder subsequently received $15 from the salesman. It was not established that the fee was paid by any check issued by the appellant, and there was no other evidence of employment by appellant.

The evidence falls far short of establishing that the appellant played any part in the agreement between the salesman and Carol Snyder. In fact, the evidence preponderates heavily in favor of the proposition the appellant did not pay Carol Snyder for referring a customer to appellant and that appellant played no role in the payment of or agreement to pay any fee to her. Furthermore, the evidence indicates that appellant had no knowledge of the "referral fee" arrangements of the salesman and, in fact, had a policy of not permitting such conduct.

Val Strough Chevrolet vs. Bright (269 A.C.A. 965) held that a discount house was not a salesman when it referred a potential car purchaser to a licensed car salesman and received from such licensed salesman a referral fee. The court said that usual attributes of an employer-employee relationship did not exist because there was no agreement or understanding between the dealer and the discount house as to any service to be rendered or compensation to be paid and that there was no evidence that the dealer exercised any control or had the right to control the conduct or activities of the discount house.

The Val Strough case applies here. Snyder referred a potential customer to a car salesman and received a fee from the salesman. There is no evidence that the appellant was involved in whatever agreement there was between Snyder and the salesman and there is no evidence that the appellant exercised any control or had the right to control Snyder.

On the basis of the evidence and the Val Strough case, we hold that the findings in paragraph VIII of the decision are not supported by the weight of the evidence in light of the whole record reviewed in its entirety and that the department has proceeded in a manner contrary to the law. We reverse the findings set forth in paragraph VIII of the decision.

We must also reverse the department on the findings in paragraph IX of the decision wherein it is found that appellant wrongfully and unlawfully advertised no down payment was necessary in the sale of a vehicle, when in fact a down payment was required, and buyers of certain described vehicles were advised or induced to obtain secondary financing in order to make the down payment. The evidence adduced by the department fails to establish that appellant advertised that "no down payment" was required. The advertisements placed into evidence by the department contained no such language. The department has confused "no down payment" with "no money down". These phrases obviously need not have the same meaning. Furthermore, the evidence discloses that, in

the two transactions used by the department as a basis for its findings, the purchasers did not meet the "no money down" offer because they either did not have adequate credit or the value of their trade-in was insufficient. Indeed, the "no money down" advertisements made reference to the necessity of an adequate trade-in or credit.

In paragraph IV, page 2, of the Amendment to Appeal, appellant advances the proposition that the decision of the department is improper and invalid in that affidavits submitted into evidence at the administrative hearing contained irrelevant material and the hearing officer proceeded in a manner contrary to law by failing to exclude the irrelevant material. The department offered, and the hearing officer accepted, into evidence, a group of affidavits wherein the appellant made no request for cross-examination. The appellant objected to the introduction of the affidavits on the basis they contained a substantial amount of information that was not relevant. The hearing officer overruled the objection subject to further objection which could be raised in the course of the proceedings. Further on in the proceedings, the following dialogue took place between the hearing officer and the appellant:

> "MR. PRITCHARD: May I again reflect my understanding that those portions of the affidavits had been submitted that are not material to the issues in the case will not be considered in any determination?
>
> "THE HEARING OFFICER: Correct."

The case of Tarpey v. Veith,(22 Cal. App. 289) involved a similar issue. There the defendant objected to the introduction of some evidence but it was allowed in, subject to a motion to strike. On appeal, the court, in sustaining the ruling of the trial judge, said:

> "...It is very evident that the trial court, in admitting the evidence complained of, contemplated that the plaintiff would obviate the defendant's objection by making proof of the fact that plaintiff's permission to use the strip of land in controversy had been communicated to the defendant, and that if the plaintiff failed to make such proof the evidence complained of would be stricken out on motion. No such motion was made. Presumably, if the defendant did not desire the evidence in question to stand, he would have moved to strike it out. We have no doubt that if such a motion had been made it would have been granted. The evidence having been admitted subject to a motion to strike out, and the defendant having failed to make such a motion, he may not now be heard to say that the ruling was erroneous."

Appellant failed to pursue the matter, elected not to make appropriate objections or motions to strike and waived any objection.

Tarpey v. Veith controls the relevancy issue raised by the appellant in this case and, therefore, we dismiss the contention of the appellant that irrelevant material was improperly received during the administrative hearing.

Appellant presents us with the proposition that the decision of the department was improper and invalid in that it was based on information obtained by the department through conduct of the department infringing on appellant's

constitutional rights; i.e., the information was the product of an unreasonable search or seizure.

Appellant's theory is that the department engaged in an unreasonable search and seizure when its agent extracted from the business records of the appellant names and addresses of persons to whom appellant had sold vehicles. Appellant contends that the examination of its records by the agents of the department went beyond those records that the appellant is required by law to keep.

Appellant's argument overlooks Section 320 Vehicle Code which provides in part: "The place of business shall be open to inspection of the premises, pertinent records and vehicles by any peace officer during business hours." We are not presented by appellant with any arguments that the inspection of the department went beyond the premises, pertinent records, or vehicles nor are we presented by any proposition from appellant that the quoted language from Section 320 Vehicle Code is unconstitutional. We find that the department's actions in obtaining the information, which was subsequently introduced into evidence at the administrative hearing, was obtained properly and with no taint of unreasonableness and, therefore, we dismiss the appellant's arguments to the contrary as being without merit.

For the first time, during oral argument before this board, appellant raised the question as to whether or not the

Director of the Department of Motor Vehicles has the authority to vacate his stay order and impose an order of revocation in his discretion and without a hearing in the event evidence satisfactory to him is presented that cause for disciplinary action has occurred during the probationary period. This issue was not raised in appellant's appeal or in its amendment thereto. Accordingly, we do not pass upon this question and refrain from doing so until it is properly raised and presented. Moreover, should the director subsequently act in an abuse of his discretion, we are satisfied that appellant will have an adequate remedy available to it.

Appellant accepts for appeal purposes, the findings of the department contained in paragraphs VII, X, XI, XII, XIII, XIV, XV, XVI, XVII and XVIII of the decision. Therefore, the matters contained therein are not before this Board on appeal except for penalty determination.

Turning to the issue of penalty, we are cognizant of the general rule that a reviewing court will not disturb the penalty imposed by the administrative agency unless there is a clear abuse of discretion. However, the Legislature has given this board the power to deviate from the general rule. Section 3055 Vehicle Code provides as follows:

> "The Board shall also have the power to amend, modify, or reverse the penalty imposed by the department."

Pursuant to this grant of authority, the New Car Dealers Policy and Appeals Board modifies the order of the Director of

the Department of Motor Vehicles, as follows:

1. Dealer's license, certificate and special plates (D-2031) heretofore issued to Holiday Ford, a corporation, are hereby revoked; provided, however, that execution of said order of revocation is hereby stayed and appellant is placed on probation for a period of three (3) years upon the following terms and conditions:

(a) That appellant shall employ and retain competent personnel for the purpose of, and diligently and promptly prepare and keep all of the necessary books and records required in the operation of its business and submit complete and accurate records and reports when and as required by the Department of Motor Vehicles.

(b) That appellant obey all laws of the United States, the State of California and its political sub-divisions and all of the rules and regulations of the Department of Motor Vehicles.

2. That should the Director of the Department of Motor Vehicles determine upon evidence satisfactory to him that cause for disciplinary action has occurred during the period of probation imposed herein, he may, in his discretion and without a hearing, immediately vacate the stay order and impose said order of revocation; otherwise, the stay shall become permanent.

PRESIDENT

VICE PRESIDENT

MEMBER

MEMBER

MEMBER

MEMBER

STATE OF CALIFORNIA

NEW CAR DEALERS POLICY & APPEALS BOARD

In the Matter of BILL ELLIS, INC., A California Corporation, Appellant, vs. DEPARTMENT OF MOTOR VEHICLES, Respondent.	Case No. A-2-69 Filed and Served: 10 October 1969

Time and Place of Hearing:	September 24, 1969, 1:30 P.M. 3500 South Hope Street Los Angeles, California
For Appellant:	Getz, Aikens & Manning By George E. Leaver 6435 Wilshire Boulevard Los Angeles, CA 90048
For Respondent:	Honorable Thomas Lynch Attorney General Michael J. Smolen Deputy Attorney General

FINAL ORDER

In the decision ordered June 30, 1969, by the Director of Motor Vehicles pursuant to Chapter 5, Part 1, Division 3, Title 2 of the Government Code, it was found that the parties to the proceedings had stipulated that appellant: (1) failed in 242 instances to file with respondent written notices of sale before the end of the third business day after transferring

the vehicles; (2) wrongfully and unlawfully failed in 24 instances to mail or deliver to respondent the report of sale of used vehicles together with such other documents and fees required to transfer the registration of the vehicles within the twenty-day period allowed by law; (3) wrongfully and unlawfully failed in 134 instances to mail or deliver to respondent the application for registration of a new vehicle together with other documents and fees required to register the vehicles within the ten-day period allowed by law; (4) reported to respondent in 10 instances a date of sale other than the true date of sale and did thereby make false statements or conceal material facts in the application for registration of the vehicles; (5) filed with respondent in 1 instance a false certificate of non-operation of a vehicle and did thereby make a false statement or conceal a material fact in the application for registration of the vehicle; and (6) reported to respondent in 6 instances a date of sale other than the true date of sale for the first date of operation of the vehicle and did thereby make false statements or conceal material facts in the application for registration of such vehicles.

It was found that the violations designated above as (4) through (6) were made without any intent to deceive or defraud; that appellant inherited numerous difficulties when it

purchased the business in 1965; that appellant has eliminated a significant amount of difficulties by inaugurating an acceptable program of bookkeeping and review and that appellant made significant efforts to correct its procedures to prevent reoccurrences when errors were brought to the attention of management.

The penalty imposed suspended appellant's license, certificate and special plates for a period of sixty days; stayed the execution of the suspension order and placed appellant on probation for a period of two years under the conditions that it: (1) employ and retain competent personnel for the purpose of accurately and promptly preparing and keeping all necessary books and records required in the operation of its business and submit complete and accurate reports to respondent; (2) abide by all laws and regulations. It was further ordered that the Director of Motor Vehicles may, in his discretion and without a hearing, vacate the stay order and impose the suspension order should he determine upon evidence satisfactory to him that cause for disciplinary action has occurred during the probationary period.

An appeal was filed with this Board pursuant to Chapter 5, Division 2 of the Vehicle Code asserting that: (1) the penalty is too harsh and severe in its entirety, and (2) the part of the order that permits the Director to vacate the stay order

and impose the order of suspension without a hearing violates the due process clause of the state and federal consitutions.

Respondent calls into question, through its brief and during oral argument, the scope of the Board's penalty review. It argues that we can interfere with the penalty "...only if there is an arbitrary, capricious or patently abusive exercise of discretion." It also informs us that its conclusions were reached by examining the scope of review vested in courts and other appeal boards reviewing determinations of administrative agencies.

I. WHAT IS THE PROPER SCOPE OF REVIEW BY THIS BOARD ON THE ISSUE OF PENALTY?

Respondent's arguments ignore fundamental rules of statutory construction. By saying the "abuse of discretion" rule controls this Board, it reads into the statutes something that isn't there. "There can be no intent in a statute not expressed in its words and there can be no intent upon the part of the framers of such a statute which does not find expression in their words." (Ex parte Goodrich 160 Cal. 410.) Respondent does not point to any statutory language susceptible of the interpretation it seeks to impose upon this Board. Our attention is called to applicable statutes but respondent directs us to no language therein suggesting we can interfere with the penalty only when, as a matter of law, it is too harsh. Failing to find statutory language supporting its position, respondent resorts to the use of extrinsic aids. It ignores

the rule that such aids should be used only when the intent of the Legislature cannot be ascertained from a plain reading of the statutes. "It is a cardinal rule, applicable to the interpretation of statutes, that, in order to ascertain the intent of the Legislature in enacting the same, recourse must be first had to the language of the statute itself and that, if the words of the enactment, given their ordinary signification, are reasonably free from ambiguity and uncertainty, the courts will look no further to ascertain its meaning." (People v. Stanley 193 Cal. 428.) Respondent has not, either in its brief or during oral argument, presented us with an analysis of the statutes circumscribing the Board's appellate powers, nor has it brought to our attention any ambiguous language, and we find none, which would authorize going beyond the plain words of the applicable statutes to determine their meaning.

The cases cited by respondent to support its position that this Board is bound by the "abuse of discretion" rule fall far short of so doing. Respondent cites the case of Brown vs. Gordon, 240 Cal. App. 2d 659, and informs us that this case "...clearly sets forth the controlling law in the area of reviewing penalties by an administrative agency." This statement is erroneous. The court said, "It is well settled that in a mandamus proceeding to review an administrative order, the determination of penalty by the administrative body will not be disturbed unless there is a clear abuse

of discretion" (emphasis added).

Respondent cites Kramer vs. Board of Accountancy, 200 Cal. App. 2d 163, as authority for the proposition that "... the penalty imposed is subject to judicial review only where a clear abuse of discretion is shown." It also argues that the "abuse of discretion" rule is applicable to a case on appeal to the Alcoholic Beverage Control Appeals Board and cites Martin v. Alcoholic Beverage Control Appeals Board, 52 Cal. 2d 287. Kramer is a proceeding in administrative mandamus and Martin is a case before the Alcoholic Beverage Control Appeals Board. A most cursory comparison of Code of Civil Procedure Section 1094.5 (concerning administrative mandamus) and Article 4, Chapter 1.5, Division 9 of the Business and Professions Code (concerning Alcoholic Beverage Control Appeals Board) with the statutes applicable to the appellate powers of this Board will demonstrate the irrelevancy of these cases to our penalty determining powers.

Having found no ambiguous language in the statutes circumscribing our scope of penalty review, we confine ourselves to those statutes to determine the scope of such review vested in this Board.

The relevant portion of Section 3054 V.C. reads as follows:

> "3054. The board shall have the power to reverse or amend the decision of the department if it determines that any of the following exist:
>
> * * *
>
> "(f) The determination or penalty, as provided in the decision of the department is not commensurate with the findings."

The quoted portion of this statute authorizes the Board to reverse or amend the penalty portion of the decision of the department when the Board "determines" that the penalty is inappropriate to the circumstances of the case as established by the findings of the respondent. Should the Board determine that the penalty is inappropriate, in its discretion, it may reverse and remand to the department pursuant to Section 3056 V.C. for refixing of penalty, or it may substitute its judgment on the issue for that of the department and amend the penalty.

Had the Legislature intended to limit this Board's scope of penalty review to cases involving a clear showing of abuse of discretion, it would have omitted subsection (f) from Section 3054 V.C. It is significant that there is no comparable provision in Business and Professions Code Section 23084 which defines the scope of review of Alcoholic Beverage Control Board, and none is to be found in Section 1094.5 of the Code of Civil Procedure. Furthermore, had the Legislature not intended that this Board have the power to substitute its judgment for that of the department on the matter of penalty, it would have omitted the word "amend" from the first sentence of Section 3054 V.C. This omission would have required the Board to remand to the department pursuant to Section 3056 V.C. for penalty redetermination. Here again, it is significant that the word "amend" contained in Section 3054 V.C., is absent from Business and Professions Code Sections 23084

and 23085 and from Code of Civil Procedure Section 1094.5. Moreover, in both of the last mentioned sections, the Legislature has specifically stated that the order "shall not limit or control in any way the discretion ..." vested in the agency. No such language is to be found in the pertinent statutes governing this Board.

We are firmly of the opinion that Section 3054 V.C. empowers this Board to reverse the penalty fixed by the department, without finding an abuse of discretion, and remand the case to the department for penalty redetermination or, in the alternative and in its discretion, exercise its independent judgment and amend the penalty accordingly.

The Board would be acting pursuant to its power under subsection (f) of Section 3054 V.C. if it amended the penalty imposed in this case because the stipulated findings contained in the decision are not challenged in this appeal. Although Section 3055 V. C. is not brought directly into play by this appeal, we consider it inappropriate to terminate a discussion of the Board's scope of penalty review without a discussion of that section. "Legislative intent should be gathered from the whole act rather than from isolated parts or words." (45 Cal. Jur. 2d, Statutes 117.) We said in the case of Holiday Ford vs. Department of Motor Vehicles A-1-69:

> "Turning to the issue of penalty, we are cognizant of the general rule that a reviewing court will not disturb the penalty imposed by the administrative agency unless there is a clear abuse of discretion. However, the

Legislature has given this board the power to deviate from the general rule. Section 3055 Vehicle Code provides as follows:

> 'The Board shall also have the power to amend, modify, or reverse the penalty imposed by the department.'"

Section 3055 V.C. supplements the penalty determination powers given the Board under Section 3054(f) V.C. Whereas Section 3054(f) V.C. applies to situations wherein we do not disturb the findings of the department but believe the penalty not to be commensurate with the findings, Section 3055 V.C. empowers us to fix the penalty following a reversal of one or more, but not all, of the findings of the department.

However, we are of the opinion, for reasons hereafter stated, that the penalty imposed by the respondent is appropriate to the circumstances of the case as set forth in the findings, and, therefore, we neither remand for refixing of penalty, nor do we amend the penalty fixed by respondent.

II. DOES DUE PROCESS OF LAW PRECLUDE THE DIRECTOR OF MOTOR VEHICLES FROM VACATING HIS STAY ORDER AND INVOKING THE SUSPENSION ORDER DURING THE PROBATION PERIOD UPON EVIDENCE SATISFACTORY TO HIM WITHOUT GIVING APPELLANT NOTICE AND OPPORTUNITY TO BE HEARD PRIOR TO TAKING SUCH ACTION?

We answer this question in the negative; the penalty imposed in this case in no way invades any of the appellant's constitutional rights.

Due process of law contemplates adequate notice and an opportunity to be heard; it does not require relitigation of issues finally determined after observance of due process. "Due process contemplates that somewhere along the line a

fair trial be had -- not that there be two or three fair trials." (Hohrieter v. Garrison, 81 Cal. 2d 384; Kramer vs. State Board of Accountancy, 200 Cal. 2d 163.) "Due process insists upon the opportunity for a fair trail, not a multiplicity of such opportunities." (Dami v. Department of Alcoholic Beverage Control, 1 Cal. Rptr. 213.) "Due process of law under the state constitution and due process of law under the federal constitution mean the same thing." (Gray vs. Hall, 203 Cal. 306.)

The appellant raises no questions concerning the propriety of the administrative proceedings conducted by the respondent pursuant to the Administrative Procedure Act. It does not contend that there were any substantive or procedural defects in those proceedings. Appellant asserts that its constitutional rights would be infringed if the respondent executed, without giving appellant another opportunity to be heard, a portion of the penalty order which respondent imposed following the administrative hearing. Appellant, in effect, is arguing due process of law affords more than one fair hearing before suffering the full impact of the penalty. The cases cited above adequately demonstrate that appellant seeks a procedural protection which neither the state nor federal constitutions afford.

Appellant does not question the power of the director to suspend appellant's license based upon the findings in his

decision. Section 11705 V.C. clearly confers such power. It follows that the director has the authority to temper the exercise of that power by granting probation and imposing reasonable conditions without affording the appellant further notice and hearing should he find a violation of those conditions to have occurred.

Appellant contends that, "Suspension or revocation by an administrative agency of a licensee's license without a prior hearing would violate due process except in cases where the action is justified by a compelling public interest. It cites the cases of Escobedo vs. State of California, 35 Cal. 2d 870 and Hough vs. McCarthy, 54 Cal. 2d 273, to support this position. This rule has no application to the issue before us because it involves a situation wherein a disciplinary action was taken by an administrative agency without any hearing whatsoever.

III. IS THE PENALTY IMPOSED BY THE DIRECTOR OF MOTOR VEHICLES COMMENSURATE WITH HIS FINDINGS?

The Legislature has enacted certain statutes requiring notice to the Department of Motor Vehicles of the sale of motor vehicles (Section 5901 V.C.) and the use of dealers' reports of sale forms (Section 4456 V.C.; regulations implementing Section 4456 V.C. are 13 Cal. Adm. Code 410.00 and 410.01.) The Legislature has charged the Director with the responsibility of enforcing these statutes and the regulations which he adopts (Sections 1650 and 1651 V.C.).

Timeliness and accuracy of reporting required data to the respondent is essential to the statutory duty of establishing and maintaining reliable records and determining fees due the state. In the absence of timely and accurate reporting, the difficulty of determining civil and criminal liability arising out of ownership and operation of the approximate 12,500,000 motor vehicles registered in California is greatly increased; the state's ability to accurately assess and collect fees is impaired and the rights of purchasers and others entitled to certificates of ownership and certificates of registration are placed in jeopardy.

The Legislature saw the necessity of compelling dealers to timely file with the respondent accurate data concerning the sale of motor vehicles and transfer of title to such vehicles as evidenced by Section 11705 V.C. This statute empowers respondent to suspend or revoke the license, certificate and special plates issued to a dealer for failing to file or improperly filing the required data. We cannot believe that the Legislature would vest in respondent the power to close the doors of a dealership, with all its economic ramifications, unless the Legislature was firmly of the opinion that compelling dealers to meet the reporting requirements is indispensible to the orderly management of documents related to the ownership of motor vehicles and that such management is a matter of importance to the public welfare.

In the case before us on appeal, appellant failed in 400 instances to timely file required documents with respondent and furnished respondent with false information in 17 instances. Appellant purchased the dealership during 1965 but untimely notices of sale and reports of sale were being received by the Department from appellant as late as September 1968. This Board is aware of the mitigating factors recited at Paragraph IX, page 3, of the Director's decision. We are also cognizant that there is no finding that appellant submitted to the Department of Motor Vehicles false data after December 1966. However, appellant has stipulated to repeated violations extending over a period of thirty months. Although respondent finds no intent to deceive or defraud on the part of appellant, the record demonstrates a long course of unlawful conduct which, at best, manifests a complete disregard of responsibility to appellant's customers, the rights of the public at large, and the orderly discharge of the respondent's duties in motor vehicle registration. The Board believes the exercise of due care on the part of appellant would have remedied the defects in appellant's reporting procedures within a reasonable length of time after the dealership was purchased.

The penalty imposed by respondent is fair and reasonable in the light of the findings. The penalty permits appellant to continue his business of selling motor vehicles. The

conditions of probation require only what the law and sound business practices already require; namely, obedience to all federal and state laws and rules and regulations of the Department of Motor Vehicles, maintenance of all necessary books and records required in the operation of appellant's business, submission of complete and accurate records and reports when and as required by the Department of Motor Vehicles, and employment of competent personnel for the purpose of keeping the necessary books and records.

Appellant argues, however, that the portion of the penalty authorizing the Director of Motor Vehicles to vacate the stay order and impose the order of suspension upon evidence satisfactory to the Director and without a hearing places appellant in the position of operating his business "...on the most tenuous of strings..." We do not believe the "string" to be tenuous. We will not presume the Director will act arbitrarily or capriciously or in any manner which would constitute an abuse of his discretion. Before vacating the stay order, the Director must find cause for disciplinary action and, before he can find such cause, he must have satisfactory evidence. Moreover, the Director is not required to vacate the stay order, even though he finds cause for doing so, but he <u>may</u> do so. These limitations, self-imposed by the Director, contemplate an orderly and conscientious examination of the evidence brought to his attention before

making any determination with reference to vacating the stay order. The Director's order affords appellant the opportunity of continuing its business of selling motor vehicles, evidencing a disposition which is entirely inconsistent with the suggestion that the Director may at some later date vacate the stay order and impose the suspension of the license without cause.

The decision of the Director of Motor Vehicles is affirmed.

ROBERT B. KUTZ, President

GILBERT D. ASHCOM, Vice-President

PASCAL B. DILDAY

MELECIO H. JACABAN

AUDREY B. JONES

ROBERT D. NESEN

STATE OF CALIFORNIA

NEW CAR DEALERS POLICY & APPEALS BOARD

In the Matter of RALPH'S CHRYSLER PLYMOUTH, A California Corporation, Appellant, vs. DEPARTMENT OF MOTOR VEHICLES Respondent.	Case No. A-3-69 Filed and Served: April 24, 1970

Time and Place of Hearing:	March 25, 1970, 9:00 A.M. 3500 South Hope Street Los Angeles, California
For Appellant:	Linder, Schurmer, Drane and Bullis By: Milton Linder and Scott Schurmer Attorneys at Law 9107 Wilshire Boulevard Beverly Hills, CA 90210
For Respondent:	Honorable Thomas Lynch Attorney General By: Michael J. Smolen Deputy Attorney General

FINAL ORDER

In the decision ordered July 2, 1969, by the Director of Motor Vehicles pursuant to Chapter 5, Part 1, Division 3, Title 2 of the Government Code, it was found that appellant: (1) Entered into conditional sale contracts for the purchase of motor vehicles in 16 instances without including in a single document all of the agreements of the buyer and seller with respect to the total cost and terms of the payment of the motor vehicles; (2) wrongfully and unlawfully failed in 78

instances to mail or deliver to respondent the report of sale of used vehicles together with such other documents and fees required to transfer the registration of the vehicles within the 20-day period allowed by law; (3) wrongfully and unlawfully failed in 23 instances to properly endorse, date and deliver, the certificates of ownership of vehicles to the transferees within a reasonable time after the sale of the vehicles; (4) delivered, following a sale, a vehicle for operation on California highways which did not have all equipment required by law; and (5) in 2 instances, included as an added cost to the selling price of the vehicles, registration fees in excess of the fees due and paid to the state.

With reference to the finding that appellant did not include in a single document all of the agreements of the buyer and seller with respect to the total cost and terms of payment of the vehicles, it was found that the law on this issue was confused and subject to many interpretations; appellant's practice in this regard was the same as that prevailing in California at the time; the standard printed conditional sale contract form used by appellant contained no spaces to reflect information concerning side loans and appellant relied on advice of counsel in following the prevailing custom and practice.

It was further found that (1) in most of the cases involving late reporting, appellant failed to meet the time requirements for submitting reports of sales, titling documents and fees,

because the vehicles were sold before appellant obtained the documents of title from the previous legal owner; (2) appellant has two full time employees whose sole function and responsibility are to expedite the timely processing of necessary documents to the respondent when sales are made; (3) the "DMV" section of appellant's business is well organized and operated; (4) the sale of a vehicle not having seat belts was an inadvertant oversight; and (5) in both cases, the overcharges for fees due the state were unintentional and the sums were refunded to the buyers.

The penalty imposed by the respondent suspended appellant's license, certificate and special plates for a period of 15 days; stayed the execution of the suspension order and placed the appellant on probation for one year under the condition that it obey all the laws of the State of California and all regulations of the Department of Motor Vehicles governing the exercise of its privileges as a licensee. It was further ordered that the Director of Motor Vehicles may, during the probationary period, in his discretion, without a hearing, but upon reliable evidence, revoke the probation and order the suspension of the license. If appellant fully complies with all terms and conditions of probation, the stay of the order of suspension shall become permanent upon the expiration of the term of probation.

An appeal was filed with this Board pursuant to Chapter 5, Division 2 of the Vehicle Code. For reasons hereinafter stated

we affirm the decision in part, reverse in part and modify the penalty.

I. DID APPELLANT VIOLATE SECTION 2982(a) CIVIL CODE[1/] BY FAILING TO INCLUDE IN THE CONDITIONAL SALE CONTRACT A LOAN AGREEMENT ENTERED INTO BETWEEN THE BUYER AND AN INDEPENDENT LOAN COMPANY FOR THE PURPOSE OF MAKING THE DOWN PAYMENT?

We passed on this question in Holiday Ford vs. Department of Motor Vehicles A-1-69 and answered it in the negative.

Respondent urges us to reconsider our prior holding. Most of the arguments advanced to support the theory that Section 2982(a) Civil Code requires the inclusion of the side-loan agreement in the conditional sale contract are discussed in Holiday Ford, supra, and, therefore, require no elaboration. We will, however, comment on two of the arguments.

Respondent calls our attention to the Assembly Interim Committee on Finance and Insurance, Final Report, December 1960. It quotes from Page 19 to show that the committee was aware that buyers of cars do not always realize they are obligating themselves to make two payments each month, or at some other interval of time; i.e., one on the loan obtained to make the down payment (side-loan) and the other pursuant to the conditional sale contract. Although the committee heard testimony on this issue, there was no finding in the report,

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1/ The events with which we are concerned occurred prior to the enactment of Section 2982.5 of the Civil Code which specifically provides for the inclusion in the conditional sale contract of data concerning side-loans which the seller assists the buyer to obtain. In this regard the Legislature specifically provided that the enactment of Section 2982.5 "shall not give rise to any inference that conduct to which it relates...was legal or illegal prior" to its effective date. (Ch. 979, Stats. 1968.)

that side-loans should be reflected in the conditional sale contract. Accordingly, the report does not support respondent's position.

Respondent argues that appellant "arranged", as distinguished from "assisted", the side-loans for the down payments. We find it unnecessary to determine the degree of involvement of the appellant in the side-loan transaction, because the side-loan agreement was not entered into by either the appellant and the buyer, or the appellant and the loan company; i.e., appellant was not a party to the side-loan agreement. The finding of the Director at Page 2, Paragraph III of the Decision, negates the theory that the buyers obligated themselves to appellant for the side-loans. The hearing officer, by implication, found that the buyers were not obligated to enter into a side-loan agreement with anyone at the time of the sale. The sale of the vehicle, in each case, occurred before the side-loan documents were executed by the buyer. The loans were independently contracted by the buyer with a third party; whether the appellant "assisted" the buyer in this regard or "arranged" for the loan is immaterial.

We find that the respondent has proceeded in a manner contrary to law with reference to its finding that appellant violated Section 2982(a) Civil Code as to each of the vehicles described as Items 1, 2, 5 through 18 in Exhibit A, attached to the accusation.

II. DID APPELLANT VIOLATE SECTIONS 4456 AND 5753 V.C. BY FAILING TO TIMELY SUBMIT REPORTS OF SALE TO THE DEPARTMENT OF MOTOR VEHICLES?

Commencing at Page 36 of its Opening Brief, appellant advances the propositions that: (1) Section 4456 V.C. was not violated because that statute requires a dealer to submit to the Department of Motor Vehicles, within 20 days for used cars, only fees due for registration and the Department of Motor Vehicles did not prove that appellant failed to timely submit such fees; (2) the context and wording of Section 4456 V.C. contemplate violations of that statute; and (3) there were many mitigating circumstances. Appellant concedes that disciplinary action can flow from violations of Section 4456 V.C. but argues that penalties should be reserved for situations where there has been neglect or intentional non-compliance with that section.

During oral argument, appellant abandoned the theory that Section 4456 V.C. required only the timely submission of registration fees and penalties.

Appellant's contention that violations of Section 4456 V.C. should be used for disciplinary action against a license only when there has been neglect or intentional non-compliance is based on the fact that section has a built-in penalty; i.e., $3.00 assessment for each late report of sale.

We do not agree with this contention. It is our opinion that violations of Section 4456 V.C. are a proper basis for disciplinary action when the licensee conducts his business

in such a way that he fails to abide by that section and implementing regulations. In Bill Ellis, Inc. vs. Department of Motor Vehicles A-2-69 we said at page 12:

> "We cannot believe that the Legislature would vest in respondent the power to close the doors of a dealership, with all its economic ramifications, unless the Legislature was firmly of the opinion that compelling dealers to meet the reporting requirements is indispensible to the orderly management of documents related to the ownership of motor vehicles and that such management is a matter of importance to the public welfare."

Appellant's argument that a dealer should be immune from administrative disciplinary action for violation of Section 4456 V.C. and implementing regulations, absent neglect or willful non-compliance, does violence to the legislative scheme created for the express purpose of assuring that documents of title to motor vehicles are handled in an orderly manner to the end that transfers of ownership of motor vehicles become a matter of public record in a reasonable time.

Appellant concedes (Page 62, Lines 1 through 18 of its opening brief) that evidence of mitigating circumstances was admitted during the hearing. That evidence was given due consideration by the hearing office and the Director of Motor Vehicles in deciding upon the issues and penalties, as indicated in Paragraph VII, Page 3, and Paragraph IV, Page 6, of the Decision. Just as was true in Fletcher Chevrolet vs. Department of Motor Vehicles A-4-69, Pages 4 to 10, the alleged mitigating circumstances here were more of an explanatory

than exculpatory nature.

The respondent found that appellant also violated Section 5753 V.C. in 23 of those transactions wherein it was found that Section 4456 V.C. had been violated. Respondent took the position that Section 4456 V.C. is violated when, in the case of the sale of a used car by a dealer, fees and appropriate documents are not forwarded to the Department of Motor Vehicles within twenty days, and that Section 5753 V.C. is also violated when such fees and documents are not forwarded to DMV within a "...reasonable time..." after the sale. Respondent apparently construes a reasonable time to be anytime within 30 days from the date of sale (which, it occurs to us, is a view that is patently inconsistent with the Legislature's mandate of twenty days under Section 4456 V.C.)

We do not believe it is necessary to decide whether respondent's construction of Section 5753 V.C., as it read at the time with which we are concerned, is correct or erroneous because the applicability of that statute is of no significance in this case.

Clearly Section 4456 V.C. was violated when appellant failed to forward fees and appropriate documents to DMV within twenty days from the date of sale. The passage of ten or more additional days aggravated the violation. The application of Section 5753 V.C. can do nothing to add or detract from appellant's misconduct. It is our view that the evidence relating to the length of delay in paying fees and

submitting documents is a matter which is properly considered when determining severity of penalty for appellant's violation of Section 4456 V.C. and that the department's findings regarding violation of Section 5753 V.C. are, at worst, harmless surplusage.

III. DID APPELLANT VIOLATE SECTION 11713(i) V.C. BY SELLING A VEHICLE THAT DID NOT HAVE SAFETY BELTS AT THE TIME OF DELIVERY?

Appellant objects to the Director's finding that it violated Section 11713(i) V.C. by selling a vehicle which did not have attached thereto required equipment, namely, seat belts, first, on the ground that there was a failure of proof and, secondly, that if a violation was established, it did not justify a penalty, in view of the large number of cars appellant sells and the degree of care appellant exerts to assure that all vehicles it sells have all of the requisite equipment.

Respondent's direct evidence of the violation was in the form of an affidavit from the buyer, which established the absence of the seat belts at the time the vehicle was delivered. The evidence offered by the appellant did not directly controvert the affidavit, and, although the buyer was produced for cross examination, appellant did not question the witness concerning the direct statement in the affidavit. The preponderance of the evidence supports the Director's finding. We, therefore, affirm the finding that seat belts were not attached to the

vehicle at the time of delivery. We are mindful of the somewhat de minimis[2/] nature of the violation, in view of appellant's volume of sales, and have given appellant's second point due consideration in passing upon the matter of penalty.

IV. DID APPELLANT VIOLATE SECTION 11713(h) V.C. (NOW SECTION 11713(g) V.C.) BY INCLUDING, AS AN ADDED COST TO THE SELLING PRICE OF VEHICLES, REGISTRATION FEES IN EXCESS OF THOSE DUE AND PAID THE STATE?

The respondent found that appellant had charged purchasers of vehicles, on two occasions, registration fees in excess of the amount required by law. The total overcharge amounted to $7.00. It was also found that the overcharges were unintentional. The evidence disclosed that, in both instances, the purchaser was reimbursed; in one case, before the accusation was filed and in the other, after the filing of the accusation.

During the proceedings before the Department of Motor Vehicles, and before this Board, counsel for the parties treated the vehicles involved in these two transactions as used vehicles. Appellant argued on appeal that a dealer, in the sale of a used car, can only make an estimate of the fees due the state and, therefore, should not be held to have violated Section 11713(h) V.C. when its estimate is not the precise amount determined by the Department.

The purchasers of the vehicles giving rise to the overcharges were William F. or Nannie M. Long (Department's

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2/ We should observe here that no one would have scoffed at this violation had the buyer been injured in an accident because of the absence of the belts.

Exhibit 5) and Louis Emmett or Maurine Theresa Prince (Department's Exhibit 17). Appellant certified to the Department of Motor Vehicles under penalty of perjury that both vehicles were sold to the purchasers as new (See Application For Registration For New Vehicles Nos. 0711716 and 0711960). The arguments by counsel concerning the need for dealers to make an estimate of fees following the sale of a used car were inapplicable.

Appellant further contends that, should this Board hold that appellant did charge for registration fees in excess of the amounts due the state, as respondent found, the mitigating circumstances are overwhelming. We find that appellant did violate, in two instances, Section 11713(h) V.C. In giving consideration to the penalty, we are mindful of the facts, as found by the Director, that the overcharges were unintentional, that the sums were refunded, and that the total amount involved was $7.00.

V. DOES THAT PORTION OF THE PENALTY THAT PERMITS THE DIRECTOR OF MOTOR VEHICLES TO VACATE HIS STAY ORDER AND IMPOSE THE SUSPENSION UPON RELIABLE EVIDENCE AND WITHOUT GIVING APPELLANT NOTICE AND OPPORTUNITY TO BE HEARD PRIOR TO TAKING SUCH ACTION VIOLATE DUE PROCESS OF LAW?

This Board has reviewed this question on two previous occasions (Bill Ellis, Inc., supra, and Fletcher Chevrolet, Inc., supra) and answered it in the negative. Appellant argues that that portion of the penalty authorizing the Director to vacate the stay order and impose the order of

suspension without giving appellant notice and an opportunity to be heard violates due process of law because appellant is left at the caprice and whim of the Department of Motor Vehicles and an administrative action which is arbitrary, oppressive or unjust must be struck down as a violation of due process.

This Board will not assume that the Director of Motor Vehicles will execute his duties or exercise his discretion in a capricious or whimsical manner. It is significant that the Director has imposed limitations upon his powers to vacate the stay order. Before vacating that order, he must find further cause for disciplinary action, and, before he can find such cause, he must have reliable evidence. As we said in Bill Ellis, Inc., supra, at Pages 14 and 15:

> "Moreover the director is not required to vacate the stay order, even though he finds cause for doing so, but he may do so. These limitations, self-imposed by the director, contemplate an orderly and conscientious examination of the evidence brought to his attention before making any determination with reference to vacating the stay order."

Appellant does not contend that the Director was without power to impose a suspension in this case without also granting a stay order. Section 11705 V.C. clearly confers such power.

> "It follows that the Director has the authority to temper the exercise of that power by granting probation and imposing reasonable conditions without affording the appellant further notice and hearing should he find a violation of those conditions to have occurred." (Bill Ellis, Inc., supra, Page 11.)

Should the Director subsequently act in a manner which constitutes an abuse of discretion, we are confident that appellant has available an adequate remedy.

We conclude that the conditions of probation imposed in this case do not invade appellant's constitutional rights.

VI. WHAT PENALTY IS APPROPRIATE TO THE FINDINGS OF THE DIRECTOR AS MODIFIED BY THIS BOARD?

In Bill Ellis, Inc., supra, commencing at Page 4, we discussed in some detail the power vested in us to review penalty. Section 3055 V.C. authorizes this Board to refix penalty following reversal of one or more of the findings of the respondent. Section 3054(f) V.C. authorizes us to refix penalty where we do not disturb the findings but believe the penalty not to be commensurate with such findings.

The Board has reversed respondent on the finding that appellant violated Section 2982(a) of the Civil Code on 16 occasions. We are, therefore, called upon to review and refix appellant's penalty pursuant to Section 3055 V.C. Pursuant to Section 3054(f) V.C., we also take into consideration the mitigating circumstances found by the hearing officer, the de minimis nature of some of the violations, and our conclusions with respect to the finding of violations of Section 5753 V. C.

Pursuant to Sections 3054(f) and 3055 Vehicle Code, the New Car Dealers Policy & Appeals Board amends the decision of the Director of Motor Vehicles as follows:

WHEREFORE, THE FOLLOWING ORDER is hereby made:

1. That the dealer's license, certificate and special plates, heretofore issued to appellant, Ralph's Chrysler-Plymouth, a California corporation, be and the same are hereby suspended for a period of five (5) days; provided, however, that the effectiveness of said order of suspension shall be stayed for a period of one (1) year from the effective date of this decision, during which time the appellant shall be placed on probation to the Director of Motor Vehicles of the State of California upon the following terms and conditions:

(a) That appellant shall obey all the laws of the State of California and all rules and regulations of the Department of Motor Vehicles governing the exercise of its privileges as a licensee.

2. Should the Director of Motor Vehicles at any time during the existence of said probationary period determine upon reliable evidence that appellant has violated any of the terms and conditions of probation, he may in his discretion and without hearing, revoke said probation and order the suspension of appellant's license as hereinabove set forth; otherwise, upon full compliance by appellant with all the terms and conditions of probation set forth and upon the expiration of the term of probation, said stay of said order of suspension shall become permanent.

WARREN BIGGS, President

AUDREY B. JONES, Vice President

PASCAL B. DILDAY

RALPH L. INGLIS

MELECIO H. JACABAN

ROBERT B. KUTZ

ROBERT D. NESEN

WINFIELD J. TUTTLE

Ralph's Chrysler Plymouth vs. Department of Motor Vehicles

Appeal No. A-3-69

2415 First Avenue
P. O. Box 1828
Sacramento, CA 95809

Telephone: (916) 445-1888

STATE OF CALIFORNIA

NEW CAR DEALERS POLICY AND APPEALS BOARD

In the Matter of RALPH'S CHRYSLER-PLYMOUTH, A California Corporation, Appellant, vs. DEPARTMENT OF MOTOR VEHICLES, Respondent.	Case No. A-3-69 Filed: June 29, 1973

Time and Place of Hearing: March 25, 1970, 9:00 A.M.
3500 South Hope Street
Los Angeles, California

For Appellant: Linder, Schurmer, Drane & Bullis
By: Milton Linder and
Scott Schurmer
Attorneys at Law
9107 Wilshire Boulevard
Beverly Hills, CA 90210

For Respondent: Honorable Thomas Lynch
Attorney General
By: Michael J. Smolen
Deputy Attorney General

AMENDMENT OF FINAL ORDER

Pursuant to the judgment of the Superior Court of the State of California, for the County of Los Angeles, dated June 13, 1973, (No. 977 583), the New Car Dealers Policy and Appeals Board hereby

amends its final order of April 24, 1970, in the above-entitled case.

The following language is deleted from Paragraph 2, Page 14, of the board's final order:

"...without a hearing..."

The following language is substituted therefor:

"...on notice and hearing..."

GILBERT D. ASHCOM

MELECIO H. JACABAN

WINFIELD J. TUTTLE

AUDREY B. JONES

ROBERT A. SMITH

JOHN ONESIAN

PASCAL B. DILDAY

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GILBERT D. ASHCOM — MELECIO H. JACABAN

WINFIELD J. TUTTLE — AUDREY B. JONES

ROBERT A. SMITH — JOHN ONESIAN

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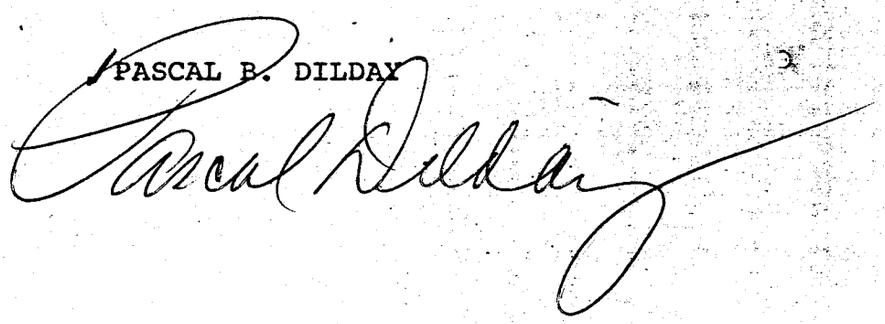

STATE OF CALIFORNIA

NEW CAR DEALERS POLICY & APPEALS BOARD

In the Matter of	)	
	)	
FLETCHER CHEVROLET, INC., a California Corporation,	)	Case No. A-4-69
	)	
Appellant,	)	Filed and Served:
	)	
vs.	)	January 5, 1970.
	)	
DEPARTMENT OF MOTOR VEHICLES,	)	
	)	
Respondent.	)	
	)	

Time and Place of Hearing:	December 10, 1969, 1:30 P.M. 3500 South Hope Street Los Angeles, California
For Appellant:	Getz, Aikens & Manning By DeWitt Manning and Walter F. Bruder, Jr. 6435 Wilshire Boulevard Los Angeles, CA 90048
For Respondent:	Honorable Thomas Lynch Attorney General Michael J. Smolen Deputy Attorney General

FINAL ORDER

In the decision ordered July 23, 1969, by the Director of Motor Vehicles pursuant to Chapter 5, Part 1, Division 3, Title 2 of the Government Code, it was found that appellant: (1) failed in 25 instances to file with respondent written notice of sale before the end of the third business day after transferring the vehicles; (2) wrongfully and unlawfully failed

in 71 instances to mail or deliver to respondent the report of sale of used vehicles together with such other documents and fees required to transfer the registration of the vehicles within the twenty-day period allowed by law; (3) wrongfully and unlawfully failed in 65 instances to mail or deliver to respondent the application for registration of a new vehicle together with other documents and fees required to register the vehicles within the ten-day period allowed by law; (4) reported to respondent in one instance a date of sale other than the true date of sale and did thereby make false statements or conceal material facts in the application for registration of the vehicles; (5) filed with respondent in two instances a false certificate of non-operation of a vehicle and did thereby make a false statement or conceal a material fact in the application for registration of the vehicle; and (6) reported to respondent in two instances a date of sale other than the true date of sale for the first date of operation of the vehicle and did thereby make false statements or conceal material facts in the application for registration of such vehicles.

Appellant introduced evidence at the administrative hearing to prove that: (1) a former business manager was discharged from appellant's employment for cause around April 1, 1967, and replaced by an experienced business manager

after which reporting to the department was improved; (2) appellant sells about 375 motor vehicles per month; (3) business hours extend through 12 to 14 hours daily, seven days a week; (4) reports of sale of motor vehicles have been written by many different employees of appellant; (5) subsequent to being served with the accusation, managerial meetings were held by the appellant with a view to improving procedures in reporting to the department; (6) commencing in February 1967, appellant engaged a contract service to assist in reporting to the department; and (7) commencing on May 20, 1969, appellant adopted a strict control over its serially numbered reports of sale and the control system has reduced the number of misuses dramatically.

The penalty imposed suspended appellant's license, certificate and special plates for a period of 20 days, with the execution of the suspension order stayed for three years. It was further ordered that the Director of Motor Vehicles may, during the 3-year period, in his discretion and without a hearing, vacate the stay order and reimpose the suspension, or a portion thereof, upon evidence satisfactory to him that cause for disciplinary action has occurred. If such action is not taken by the Director during the 3-year period, the stay is to become permanent.

An appeal was filed with this Board pursuant to Chapter 5, Division 2, of the Vehicle Code alleging that: (1) the hearing

officer wrongfully restricted appellant from producing evidence to support its contention that in many instances delay in submitting reports of sale of vehicles was caused by circumstances beyond appellant's control; (2) the part of the order that permits the director to vacate the stay order and impose the order of suspension without a hearing violates due process of law; and (3) the penalty is unduly harsh and severe in its entirety in view of abundant and substantial evidence of mitigation.

I. WAS EVIDENCE IMPROPERLY EXCLUDED DURING THE PROCEEDINGS BEFORE THE OFFICE OF ADMINISTRATIVE PROCEDURE?

Appellant took the position there are instances when tardiness in submitting reports of sale to the Department of Motor Vehicles is caused by circumstances beyond appellant's control. At the administrative hearing, appellant made an offer of proof to show that 45% of its retail automotive sales were transacted with the buyer electing to obtain outside financing; i. e., financing through sources unrelated to the dealer. Appellant also made an offer of proof that, in many instances, the late report of sale was occasioned by documents of title of the vehicle being in transit to or in the hands of the Department of Motor Vehicles. Appellant contended that the outside financing and title in transit situations placed timely reporting to the department beyond its control and

that the offered evidence was improperly excluded.

The record on appeal does not support appellant's contention that the evidence was improperly excluded at the administrative hearing. The delays in reporting were not caused by circumstances beyond appellant's control. On the contrary, the delays were caused by circumstances created by appellant. Moreover, in its offers of proof, appellant neglected to designate items in the accusation to which its offers related. Thus, the evidence was properly excluded, not only because it was irrelevant, but, also, the offers of proof were deficient.

Appellant is, in effect, contending that the degree of discipline imposed upon it for failing to abide by applicable laws and regulations should be minimized, notwithstanding the fact appellant's failure to comply with such laws and regulations results from business practices it and some other dealers have elected to pursue. We cannot agree with this contention. Section 5901 V. C. provides that a sale of a motor vehicle occurs when the purchaser has paid the purchase price or, in lieu thereof, has signed a purchase contract or security agreement and has taken possession of the vehicle. Pursuant to Section 4456 V.C. and a regulation of the Department of Motor Vehicles (13 Cal. Adm. Code 410.00), the report of sale of vehicles must be completed by the dealer and purchaser at the time of sale and the form delivered or mailed to the Department of Motor Vehicles within 10 days for a new vehicle and 20 days for a used vehicle. Permissible deviations from this law are two

in number and the only one relevant to this case is 13 Cal. Adm. Code 410.01(b).

This rule stays the commencement of the period of time for reporting the sale of a used vehicle where the document of title to the vehicle is being processed by the department for transfer of ownership or renewal of license. Under this rule, the commencement of the 20-day period is stayed until the department has reissued the document of title. The dealer is enabled to sell a trade-in even though the document of title is being processed by the department and not in the dealer's possession. However, the rule does not, in any way, absolve the dealer from his responsibility of making such arrangements as are necessary to obtain the document of title promptly upon its issuance by the department and of processing the report of sale of the vehicle within the twenty-day period which commences to run when the document is issued by the department.

If the appellant wishes to avoid disciplinary action by the department based on untimely filing of reports of sale, it is incumbent upon appellant to pursue business practices which do not preclude following the above cited rules and regulations. Appellant concedes it is possible to avoid the delay caused by outside financing. Indeed, appellant urges in mitigation that it has recently developed a procedure for avoiding delay in reporting although the buyer insists upon obtaining his own

financing. This demonstrates that it was within the power of the appellant to comply at the time of its violations.

With reference to appellant's contention that it is precluded from filing timely reports of sale because the document of title is in transit or is in the hands of the department, again it is the business practice of appellant that creates the circumstances precluding it from timely filing. Appellant takes note of the regulation of the department (13 Cal. Adm. Code 410.01(b)) which provides that, where title is in transit or in the hands of the Department of Motor Vehicles, the 20-day period is stayed until the department reissues the certificate of title which enables recordation of the sale. It concedes that this regulation is of benefit to dealers, however, appellant contends it does not protect the dealer from untimely reporting in all situations. Appellant gives as an example the situation where the person to whom title was issued moves without delivering the document of title to the dealer and leaves no forwarding address. We are aware that there are circumstances which place obtaining the certificate of ownership beyond the control of the dealer, however, all examples given by appellant contain the same element; i. e., appellant created such circumstances. Appellant elects to sell vehicles without assurance that the certificate of ownership will be in its possession within the 20-day period.

Appellant has made efforts to eliminate deficiencies in its reporting procedures. Evidence of these efforts was properly admitted at the administrative hearing because such evidence was truly of a mitigating nature. The evidence should have been and was considered in determining severity of penalty. Evidence that delays in reporting sales of vehicles occurred because of such things as outside financing being obtained by the buyer or the document of title in transit or in the hands of the department is not evidence of a mitigating nature. Such circumstances merely explain the cause of untimely reporting, but are not exculpatory and hence are not relevant to the issue of penalty.

We turn now to the deficiency in the offer of proof. Appellant made an offer to show that 45% of its retail sales are transacted with financing obtained by the buyer, independently of the appellant. However, it made no offer to show that any of the vehicles specified in the accusation were purchased from appellant, with the buyer obtaining independent financing, much less that the obtaining of such financing delayed submission of report of sale. Appellant urges that we take a percentage, which it claims represents the volume of retail sales financed by the buyer through sources unrelated to appellant, and apply that percentage to the number of reports of sale identified in the accusation as not timely filed. We apparently are asked to conclude that the product of this computation would represent

the number of reports of sale untimely filed due to outside financing. The hearing officer properly rejected this approach. Appellant attempted to deal in a hypothetical formula when it should have offered to show which vehicles listed in the accusation actually fell in the "delay through outside financing" category. Appellant could have determined from its own records precisely which items in the accusation, if any, fell within this category.

Appellant's offer to prove that untimely reports of sale occurred by reason of the fact that documents of title to vehicles were in the hands of the department or in transit, was similarly deficient in that the offer failed to identify any of the vehicles specified in the accusation as falling within this category. Appellant maintained that "on occasion" it could not forward the documents of title to the department within the 20-day period notwithstanding 13 Cal. Adm. Code 410.01(b), but it failed to connect the occasions with the ones charged in the accusation. We do note the uncontroverted testimony produced at the administrative hearing that department records reveal the accusation contained no vehicles involving title in transit.

This Board recognizes that strict compliance with the 10- and 20-day rules may be inconvenient or even difficult in some situations. However, the Legislature and the department have established these rules, and it is not the function of

this Board, sitting in its appellate capacity to modify them. That power resides in the Legislature and the department.

II. DOES THAT PORTION OF THE PENALTY THAT PERMITS THE DIRECTOR OF MOTOR VEHICLES TO VACATE HIS STAY ORDER AND IMPOSE THE SUSPENSION UPON EVIDENCE SATISFACTORY TO HIM AND WITHOUT GIVING APPELLANT NOTICE AND OPPORTUNITY TO BE HEARD PRIOR TO TAKING SUCH ACTION VIOLATE DUE PROCESS OF LAW?

The penalty imposed in this case does not invade any of the appellant's consitutional rights. This issue was before us and decided in Bill Ellis, Inc. vs. Department of Motor Vehicles, a-2-69, wherein we said, in part:

> "Due process of law contemplates adequate notice and an opportunity to be heard; it does not require relitigation of issues finally determined after observance of due process. 'Due process contemplates that somewhere along the line a fair trial be had -- not that there be two or three fair trials.' (Hohrieter v. Garrison, 81 Cal. 2d 384; Kramer vs. State Board of Accountancy, 200 Cal. 2d 163.) 'Due process insists upon the opportunity for a fair trial, not a multiplicity of such opportunities.' (Dami v. Department of Alcoholic Beverage Control, 1 Cal. Rptr. 213.) 'Due process of law under the state constitution and due process of law under the federal consitution mean the same thing.' (Gray vs. Hall, 203 Cal. 306.)"

III. IS THE PENALTY IMPOSED BY THE DIRECTOR OF MOTOR VEHICLES COMMENSURATE WITH HIS FINDINGS?

In Bill Ellis, Inc., supra, the proper scope of review by this Board on the issue of penalty was discussed. We said:

> "We are firmly of the opinion that Section 3054 V.C. empowers this Board to reverse the penalty fixed by the department, without finding an abuse of discretion, and remand the case to the department for penalty redetermination or, in the alternative and in its discretion, exercise its independent judgment and amend the penalty accordingly."

We conclude that the penalty imposed by the Director of Motor Vehicles in the case before us is unduly severe in its

entirety. We are not unmindful that we stressed in Bill Ellis, Inc., supra, the importance of dealers making timely and accurate reports to the Department of Motor Vehicles. We pointed out that the Legislature indicated a firm opinion that compelling dealers to meet reporting requirements is a matter of importance to the public welfare. As further evidence of the Legislature's views in this regard, we point out that failing to make timely reports of sale (pursuant to Section 4456 Vehicle Code and 13 Cal. Adm. Code 410.00 and 410.01) constitutes an infraction and is punishable upon first conviction by a fine not exceeding $50.00, punishable for a second conviction within a period of one year by a fine not exceeding $100.00, and punishable for a third or any subsequent conviction within a period of one year by a fine not exceeding $250.00. These fines may be levied by the court in addition to the $3.00 misuse fee levied by the department. Failing to submit the notice of sale within the three-day period required by Section 5901 V.C. is looked upon by the Legislature with even more seriousness. This failure constitutes a misdemeanor and is punishable by incarceration for a period not to exceed six months or by a fine not exceeding $500.00 or by both such fine and incarceration. (See Sections 40000 and 42001 Vehicle Code.)

This Board, sitting in its appellate capacity, is bound by the record produced at the administrative hearing. According to that record, the ratio of reporting delinquencies to total

sales is small and substantial efforts on the part of appellant to eliminate such delinquencies have been made. We do not believe,that this appellant's misconduct, as enumerated in the director's decision, was of such graveness that it should face a suspension of license for 20 days.

Furthermore, on the facts before us, it is our opinion that three years is an excessive time for the appellant to labor under the stay order. The Director of Motor Vehicles found that appellant has taken steps to correct its reporting deficiencies. It should not require a period of three years to determine whether or not such steps will be remedial. If appellant does not eliminate its delinquencies within a one-year period, stringent action should be taken by the department to compel compliance. On the other hand, if appellant's new procedures or modifications thereof do correct the delinquencies, it should not be required to operate for longer than one year in jeopardy of license suspension under the director's order herein.

Pursuant to Section 3054 V.C., the New Car Dealers Policy and Appeals Board amends the decision of the Director of Motor Vehicles as follows:

WHEREFORE, THE FOLLOWING ORDER IS HEREBY MADE: The dealer's license, certificate and special plates (D-1964) issued to Fletcher's Chevrolet, Inc., a California corporation, are each suspended for ten (10) days, with execution of said

suspension stayed for one (1) year upon the condition that should the Director of Motor Vehicles, at any time during the period of the stay, determine upon evidence satisfactory to him that cause for disciplinary action occurred, he may in his discretion and without a hearing vacate the stay and reimpose the suspension or a portion thereof, and that should no such determination be made, the stay shall become permanent.

GILBERT D. ASHCOM, Vice-President

WARREN BIGGS

PASCAL B. DILDAY

RALPH L. INGLIS

MELECIO H. DACABAN

AUDREY B. JONES

BEFORE THE NEW CAR DEALERS POLICY AND APPEALS BOARD

OF THE STATE OF CALIFORNIA

In the Matter of MISSION PONTIAC CO., a California corporation, Appellant, v. DEPARTMENT OF MOTOR VEHICLES, Respondent.	Case No. A-6-70 Filed and Served: 21 August 1970

Time and Place of Hearing: July 29, 1970, 11:00 A.M.
State Building
303 West Third Street
San Bernardino, California

For Appellant: John Fisher
Attorney at Law
Swing, Swing & Fisher
419 North "E" Street
San Bernardino, CA 92401

For Respondent: Honorable Thomas Lynch
Attorney General
By: Robert J. Polis
Deputy Attorney General

FINAL ORDER

In the decision ordered December 3, 1969, by the Director of Motor Vehicles pursuant to Chapter 5, Part 1, Division 3, Title 2 of the Government Code, it was found that appellant:

(1) Failed in 11 instances to timely submit to respondent a written notice of the transfer of interest in certain motor vehicles; (2) wrongfully and unlawfully failed in 32 instances to mail or deliver to respondent the report of sale of used vehicles together with such other documents and fees required to transfer registration of the vehicles within the 20-day period allowed by law; (3) wrongfully and unlawfully failed in 72 instances to mail or deliver to respondent the report of sale of new vehicles together with such other documents and fees required to transfer registration of vehicles within the 10-day period allowed by law; and (4) filed in one instance with respondent a certificate of non-operation for a vehicle when, in fact, the vehicle was in operation during a portion of the period covered by the certificate.

The Director found that the appellant offered evidence to establish: (1) In the majority of incidences, the delay in reporting was caused by financial institutions with whom the buyers of the automobiles were arranging loans and by incompetent clerical help of appellant; (2) appellant had, subsequent to the above listed violations, revised its office procedures to avoid repetition of such violations; and (3) appellant's general manager has been in the automobile business 43 years and has been appellant's general manager for the past 14½ years.

The original penalty imposed by respondent called for a suspension of appellant's license, certificate and special

plates for a period of one year; provided, however, execution of the order of suspension was stayed and appellant was placed on probation for a period of two years with the provision that appellant strictly comply with all laws of the United States and the State of California, and the rules and regulations of the Department of Motor Vehicles. The penalty vested the Director of Motor Vehicles with the power to vacate the stay order and impose the suspension or otherwise modify the order if, after giving appellant notice and opportunity to be heard, the Director should determine during the two-year probationary period that a violation of probation had occurred. Should respondent faithfully abide by the probationary terms for the two-year period, the stay shall become permanent and respondent restored to all license privileges.

Appellant petitioned respondent for reconsideration and, upon reconsidering the matter, respondent reduced the period of suspension from one year to thirty days. The provisions for stay of the penalty, and for probation were not changed.

An appeal was filed with this Board pursuant to Chapter 5, Division 2 of the Vehicle Code.

I. HAS THE DEPARTMENT OF MOTOR VEHICLES PROCEEDED WITHOUT OR IN EXCESS OF ITS JURISDICTION AND IN A MANNER CONTRARY TO THE LAW?

Appellant contends that Section 11705 Vehicle Code, used in conjunction with Section 4456 and 5901 Vehicle Code, is unconstitutional as applied to the circumstances of this case.

It concedes that the regulation of commerce in motor vehicles is a valid exercise of the police power. It cites authority for the proposition that substantive due process is a limitation on the police power and that such power encompasses reasonable regulation of individual rights for the general welfare. Appellant further contends that these statutes need not be unconstitutional but that it is the application of them to the circumstances involved in this case that raises a constitutional question.

Appellant's theory is that it is being denied substantive due process of law in that, according to appellant, the only party that could be injured by the failure of a dealer to comply with the statutory requirements regarding transfer of title of vehicles would be the dealer himself. This theory is based upon an erroneous premise. We do not deem it necessary to discuss the multiple purposes of Sections 4456 and 5901 Vehicle Code; they were enacted for several reasons unrelated to insulating an automobile dealer from liability to the public as owner of a vehicle following the transfer of his interest of a motor vehicle to another. Indeed, Somerville v. Washington Indemnity Company, 218 Cal. App. 2nd 237, a case cited by appellant, discusses at p. 246-247 the multiple purposes for Section 177 V.C. (now Section 5900 and 5901 V.C.). See also Gorman v. Taylor, 176 Cal. App. 2d, 600 and Evilsizor v. Department of Motor Vehicles, 251 Cal. App. 2d 216.

We find no denial of substantive due process in the application of the relevant statutes to the facts found in the record before us. Certain statutory obligations attach to the right of a licensed dealer to buy and sell automobiles including the timely and accurate reporting of certain data to respondent. These obligations seek to accomplish a legitimate purpose as determined by the Legislature; i. e., the orderly management of documents related to the ownership of motor vehicles. Meeting these statutory obligations may prove to be inconvenient and sometimes difficult, but we are far from being persuaded that the application of such obligations to the facts in this case constitute in any manner an unreasonable exertion of the police power or arbitrary governmental regulation.

During oral argument and in its briefs, appellant contended that Section 11705 Vehicle Code, as used in conjunction with Sections 4456 and 5901 Vehicle Code, was not meant to be construed, or shouldn't be construed, in such a way that untimely compliance therewith could result in a dealer's license being suspended or revoked. Appellant calls to our attention provisions in Section 11705 Vehicle Code which require a showing of fraudulent practices on the part of a dealer before disciplinary action can be taken against his license for violating those provisions. Appellant further notes that the provision "...used

duplicate dealer's reports of sale or copies contrary to the provisions of 4456..." is inserted among the provisions requiring a showing of fraudulent practices. From this, appellant reasons that it was intended that the use of duplicate dealer's reports of sale or copies thereof contrary to Section 4456 Vehicle Code must also be fraudulent or involve moral turpitude before such use should form a basis for license discipline. We reject this theory because it requires reading into the statute language that isn't there. "There can be no intent in a statute not expressed in its words and there can be no intent upon the part of the framers of such statute which does not find expression in their words." (Ex parte Goodrich 160 Cal. 410.) Had the Legislature intended a construction of the relevant portion of Section 11705 Vehicle Code urged by appellant, it would have provided the qualifying language as it did in the other provisions of this statute.

The language of Section 11705 Vehicle Code, as used in conjunction with Section 4456 and 5901 Vehicle Code, clearly vests in the Director of Motor Vehicles the authority to take disciplinary action against a dealer's license, without a showing of intentional wrongdoing, when a dealer fails to abide by the statutes and implementing regulations. Such a construction has been affirmed in Evilsizor vs. Department of Motor Vehicles, 251 Cal. App. 2d, 216, and by this Board

in several cases.

In Bill Ellis, Inc., vs. Department of Motor Vehicles, A-2-69, we said: "The Legislature saw the necessity of compelling dealers to timely file with the respondent accurate data concerning the sale of motor vehicles and transfer of title to such vehicles as evidenced by Section 11705 V.C. This statute empowers respondent to suspend or revoke the license, certificate and special plates issued to a dealer for failing to file or improperly filing the required data. We cannot believe that the Legislature would vest in respondent the power to close the doors of a dealership, with all its economic ramifications, unless the Legislature was firmly of the opinion that compelling dealers to meet the reporting requirements is indispensible to the orderly management of documents related to the ownership of motor vehicles and that such management is a matter of importance to the public welfare."

In Ralph's Chrysler-Plymouth vs. Department of Motor Vehicles, A-3-69, we said, "Appellant's argument that a dealer should be immune from administrative disciplinary action for violation of Section 4456 V.C. and implementing regulations, absent neglect or willful non-compliance, does violence to the legislative scheme created for the express purpose of assuring that documents of title to motor vehicles are handled in an orderly manner to the end that transfers

of ownership of motor vehicles become a matter of public record in a reasonable time."

II. IS THE PENALTY IMPOSED BY THE DIRECTOR OF MOTOR VEHICLES COMMENSURATE WITH HIS FINDINGS?

We reviewed the penalty-determining powers of this Board in Bill Ellis, Inc., vs. Department of Motor Vehicles, supra, and concluded that we may, without finding an abuse of discretion on the part of the respondent, find that the penalty imposed by the respondent is excessive, exercise our independent judgment and amend the penalty accordingly. For the reasons discussed above, we recognize the importance to the public of requiring dealers to make timely and accurate reports to the Department of Motor Vehicles. However, we are of the opinion that the penalty imposed by the Director of Motor Vehicles in the case before us is not commensurate with the findings in that the provision for a thirty-day suspension is too severe.

The evidence showed that appellant's business routine was interrupted during the period in which the violations occurred by illness of personnel and the removal of its place of business to a new location.

Moreover, it appears that appellant revised its office procedures, made personnel changes to avoid repetition of past delinquencies, and that appellant's management is genuinely impressed with the need to closely supervise office procedures

to effectuate timely and accurate reporting and to meet its statutory obligations.

We have also concluded that two years is an excessive length of time for appellant to be under the probationary terms of the stay order. The Director of Motor Vehicles found that appellant has taken substantial steps to correct its reporting deficiencies and we concur with this finding. It should not require a period of two years to determine whether or not such steps will be remedial. If appellant does not correct its procedural deficiencies within a one-year period, appropriate action should be taken by the Department to compel compliance. On the other hand, if the new procedures or modifications thereof do correct the deficiencies, appellant should not be required to operate for longer than one year in jeopardy of license suspension under the Director's order herein.

Accordingly, pursuant to Section 3054 Vehicle Code, the New Car Dealers Policy and Appeals Board amends the decision of the Director of Motor Vehicles to provide as follows:

WHEREFORE, THE FOLLOWING ORDER is hereby made:

The dealer's license, certificate and special plates issued to the dealer, Mission Pontiac Co., a California corporation, are hereby suspended for a period of ten (10) days; provided, however, execution of said order of suspension is hereby stayed and the dealer is placed on probation for a

period of one (1) year under the following terms and conditions:

1. The dealer shall strictly comply with all of the provisions of the Vehicle Code and the regulations of the Department of Motor Vehicles governing dealers in motor vehicles in the State of California.

2. The dealer shall obey all laws of the United States and of the State of California and the political subdivisions thereof and the rules and regulations of the Department of Motor Vehicles.

If and in the event the Director of Motor Vehicles should determine, after giving the dealer notice and opportunity to be heard, that a violation of probation has occurred, the Director may terminate the stay and impose suspension or otherwise modify the order. In the event the dealer shall faithfully keep the terms of the conditions imposed for the period of one (1) year, the stay shall become permanent and the dealer shall be restored to all of its license privileges.

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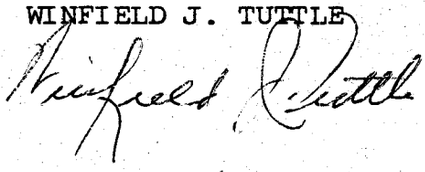

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Gilbert D. Ashcom

WARREN BIGGS — GILBERT D. ASHCOM

PASCAL B. DILDAY — RALPH L. INGLIS

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STATE OF CALIFORNIA

NEW CAR DEALERS POLICY AND APPEALS BOARD

In the matter of RALPH WILLIAMS FORD, (now known as 4 SEASONS FORD), A California coporation, Appellant, vs. DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF CALIFORNIA, Respondent.	Case No. A-5-69 FILED: March 14, 1974

Time and Place of Reconsideration:	February 13, 1974, 1:00 p.m. Auditorium (First Floor) 2570 - 24th Street Sacramento, CA 95818
For Appellant:	Linder, Schurmer, Drane & Bullis By: Milton Linder Attorney at Law 10880 Wilshire Blvd., Suite 1000 Los Angeles, CA 90024
For Respondent:	Honorable Evelle J. Younger Attorney General State of California By: Alan Hager Deputy Attorney General

FINAL ORDER AFTER RECONSIDERATION

This order is filed pursuant to the judgment of the Superior Court of the State of California, for the County of Los Angeles

(No. C980823), the peremptory writ of mandate issued by the same court, dated January 12, 1973, and the unpublished opinion of the Court of Appeal of the State of California, Second Appellate District, Division One (2d Civ. No. 39146) filed July 14, 1972, all related thereto and all incorporated herein by reference.

This board's final order A-5-69, filed June 11, 1970, as amended by its final order dated June 12, 1973, reversed, in pertinent part, the Decision of the Director of Motor Vehicles which affirmed Finding of Fact VII finding that the respondent [appellant] in five instances listed sums, which were properly down payments, as part of the unpaid balance in conditional sale contracts, and Determination of Issues I, determining that a cause for disciplinary action has been established under Section 2982(a) Civil Code and Section 11705 Vehicle Code.

Pursuant to the peremptory writ of mandate, so much of the final order reversing the decision of the director, as set forth above, is set aside. So much of Finding of Fact VII and Determination of Issues I, as set forth above, are hereby affirmed.

In light of our action herein, we have reconsidered the penalty contained in our final order A-5-69, as amended. With the exception of the terms of probation which we deem require some modification, we find that the penalty contained therein providing for revocation, stayed for a period of three years,

with 10 days actual suspension to be appropriate and commensurate with the findings.

WHEREFORE, the following order is hereby made:

The dealers license, certificate and special plates (D-1758) heretofore issued to appellant, RALPH WILLIAMS FORD, INC., are and each is hereby revoked; provided, however, that the effectiveness of said order of revocation shall be stayed for a period of three (3) years from the effective date of this decision, during which time the appellant shall be placed on probation to the Director of Motor Vehicles of the State of California upon the following terms and conditions:

The dealer's license, certificate and special plates (D-1758) heretofore issued to appellant, RALPH WILLIAMS FORD, INC., are suspended for a period of ten (10) days.

Appellant, and its officers, directors and stockholders shall comply with the laws of the United States, the State of California and its political subdivisions, and with the rules and regulations of the Department of Motor Vehicles.

If appellant, or any of appellant's officers, directors or stockholders, is convicted of a crime, including a conviction after a plea of nolo contendere, such conviction shall be considered a violation of the terms and conditions of probation.

In the event appellant shall violate any of the terms and conditions above set forth during the period of the stay,

then the Director of Motor Vehicles, after providing appellant due notice and an opportunity to be heard, may set aside the stay and impose the revocation, or take such other actions as the director deems just and reasonable in his discretion. In the event appellant does comply with the terms and conditions above set forth, then at the end of the three-year period, the stay shall become permanent and appellant's license fully restored.

In view of the foregoing, it is unnecessary to address ourselves herein to the matters of appellant's Request for Hearing and Petition for Relief from Penalty and/or Stay of Execution, both dated November 9, 1973.

This order shall be effective April 12, 1974.

WINFIELD J. TUTTLE

THOMAS KALLAY

GILBERT D. ASHCOM

MELECIO H. JACABAN

AUDREY B. JONES

A-5-69

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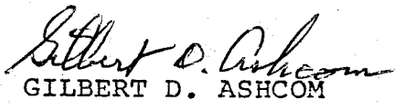

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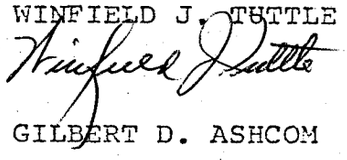

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A-5-69

STATE OF CALIFORNIA

NEW CAR DEALERS POLICY & APPEALS BOARD

In the Matter of PADRE DODGE, a California Corporation, Appellant, vs. DEPARTMENT OF MOTOR VEHICLES, Respondent.	Case No. A-7-70 Filed and Served: July 1, 1970

Time and Place of Hearing:	June 10, 1970, 11:00 A.M. 1350 Front Street San Diego, California
For Appellant:	Richard T. Hilmen, Jr. Attorney at Law 3104 Fourth Avenue San Diego, California
For Respondent:	Honorable Thomas Lynch Attorney General By: Robert J. Polis Deputy Attorney General

FINAL ORDER

In the decision ordered January 30, 1970, the Director of Motor Vehicles, pursuant to Chapter 5, Part 1, Division 3, Title 2 of the Government Code, found that on November 16, 1968, and May 1, 2 and 3, 1969, appellant caused to be published in

a newspaper advertisements for the sale of specific motor vehicles without identifying those vehicles by either the vehicle license number or the vehicle identification number.

At the administrative hearing, appellant introduced evidence to prove that: (1) At the time of the alleged violations, regulations requiring the identification of vehicles by license number or by vehicle identification number had been in existence for only a short time. (2) Appellant was confused with reference to what was required, by way of identification of vehicles, although appellant had received a written communication from the Department of Motor Vehicles which set forth, verbatim, the relevant portion of the applicable regulation. (3) Appellant did use the last four numbers of the vehicle identification number in its advertisements. (4) Because of an occasional mixup between appellant's employees and the newspaper publishing the ads, there were a few instances where neither license number nor identification number was used in describing used automobiles in advertisements published by appellant. (5) In the past, appellant's advertising had caused respondent to write letters instructing appellant to change its advertising practices, and appellant had corrected its advertising according to the specific instructions of respondent, e. g. by discontinuing use of its stock numbers.

The Decision of the Director of Motor Vehicles found that appellant's advertising practices with reference to

vehicle identification were in violation of Section 11713(a) Vehicle Code and 13 Cal. Adm. Code 432.01. Pursuant to these findings, the Director suspended appellant's license, certificate and special plates for a period of twenty days, and stayed execution of the suspension of the license, certificate and special plates upon the condition that no subsequent determination be made, after hearing, that cause for disciplinary action has occurred within three years from the effective date of the Decision. The order further provided that, should a subsequent determination be made by the Director that cause for disciplinary action occurred before the expiration of three years from the effective date of the Decision, the Director may, in his discretion, vacate the stay order and impose the suspension. If no such determination is made, the stay will become permanent.

An appeal was filed with this Board pursuant to Chapter 5, Division 2 of the Vehicle Code.

I. ARE THE FINDINGS OF THE RESPONDENT SUPPORTED BY THE WEIGHT OF THE EVIDENCE IN LIGHT OF THE WHOLE RECORD REVIEWED IN ITS ENTIRETY?

Appellant contends that the findings are not supported by the weight of the evidence in that: (1) There was no evidence offered by either party in support of the finding that a prospective purchaser was unable to identify any of the vehicles advertised as those offered for sale. (2) No evidence was

offered by the respondent, before it rested, to prove that the numbers used by appellant in its advertising were not vehicle identification numbers.

We agree that the administrative record is devoid of any direct evidence that specific prospective purchasers were mislead by appellant's advertising. However, 13 Cal. Adm. Code 432.01, adopted by the Director of Motor Vehicles to implement Section 11713(a) Vehicle Code provides as follows:

> "Any specific vehicle advertised for sale by a dealer shall be identified by either its vehicle identification number or license number so that a prospective purchaser may recognize it as the vehicle advertised for sale."

Neither this regulation nor the statute it implements requires direct evidence that one or more specific persons were mislead by appellant's advertising. The language "...so that prospective purchasers may recognize it as the vehicle advertised for sale..." is merely explanatory, stating the purpose of the requirement that vehicles advertised for sale by a dealer must be identified by either the vehicle license number or the vehicle identification number, and does not qualify the mandatory requirements of the regulation prescribing the manner in which the vehicles must be described in order to satisfy the provisions of Section 11713(a) Vehicle Code.

The evidence clearly established that appellant, an entity licensed by respondent to sell motor vehicles, did publicly advertise specific vehicles without properly identifying such

vehicles. Whether any specific prospective customer was or was not, in fact, mislead thereby is immaterial.

Absent a license number or a vehicle identification number in the advertisement, there is certainly an inference that a prospective buyer could not identify the vehicle advertised for sale and he would, therefore, be mislead by the advertisement. There being no requirement that respondent prove by direct evidence that specific prospective purchasers were mislead as a result of appellant's advertising policies and, inasmuch as an inference from facts based upon substantial evidence is sufficient to support a finding (Evidence Code Section 600), the finding of the Director that prospective buyers were not able to identify vehicles as those for sale is supported by the weight of the evidence.

Turning to appellant's contention that respondent failed to prove, before it rested, that four digits do not constitute an identification number, appellant does not argue that this element was never proven but does contend that proof came untimely; i.e., after respondent rested, and, further, that respondent, rather than the hearing officer, should have developed the evidence meeting respondent's burden of proof. Appellant contends its motion to dismiss should have been granted based upon the failure of respondent to prove its case before resting.

O'Mara vs. State Board of Pharmacy, 246 Cal.App.2d 8, 54 Cal.Rptr. 324, clearly negates the contentions of appellant in this regard. There, the State Board of Pharmacy, in a proceeding conducted pursuant to the Administrative Procedure Act (Government Code 11500, et. seq.) did not prove that drugs used by respondent-pharmacist to refill a prescription were, in fact, the drugs called for by the prescription. Respondent made a motion for nonsuit, at the time the Board initially rested its case, based upon this premise. The motion was denied. In discussing respondent's contention that it was error to deny the motion, the district court of appeals said:

> "...the law is clear that the hearing officer had no authority to grant such a motion in any event. It was squarely decided in Frost v. State Personnel Board, 190 Cal.App.2d 1, 5-6, 11 Cal.Rptr. 718, and Kramer v. State Board of Accountancy, 200 Cal.App.2d 163, 175, 19 Cal.Rptr. 226, that a hearing officer may not entertain a motion for nonsuit, but must proceed with the taking of evidence until all of the testimony to be offered by all the parties has been received. When appellant testified in his own behalf, he stated without reservation that the drugs supplied were the drugs prescribed.
>
> "At the time the Board initially rested, it had not yet necessarily concluded its case in chief. Government Code section 11513, subparagraph (b), which governs the conduct of administrative hearings, provides:
>
> "'(b) Each party shall have these rights: to call and examine witnesses; to introduce exhibits; to cross-examine opposing witnesses on any matter relevant to the issues even though that matter was not covered in the direct examination; to impeach any witness regardless of which party first called him to testify; and to rebut the evidence against him. <u>If respondent does not testify in his own behalf he may be called and examined as if under cross-examination</u>.' (Emphasis added.)

"(3) In his reply brief appellant invites us to speculate as to what the result would have been if he had chosen not to testify and had declined to answer questions propounded to him when called by the Board on the ground that his answers thereto might subject him to prosecution upon criminal charges. We need not consider any such hypothetical questions since appellant in fact did exercise his right to testify and in so doing he removed any possible doubt that might have existed as to the nature of the drugs he had supplied. He very effectively eliminated the need, if any there was, for the Board to offer any further evidence on this issue."

In the case before us, there is abundant evidence, conclusively proving that four digits do not constitute a vehicle identification number. James H. Robinson, an adverse witness called by appellant, was asked by appellant how he determined that four digits in an exhibit introduced by respondent was not a proper identification number. The witness replied:

"I went to the National Auto Theft Bureau Book and determined that if in fact this was a number, this was what we call a line number or a manufacturing number -- the number that this vehicle appeared on the line, is not complete, it is not a complete identification number in that I could not determine the year, the model, make, or the manufacturer, by the elimination of the front numbers and digital numbers and so on." (R.T. 26, lines 20-26.)

Further testimony elicited from this witness is as follows:

"Q Now these in fact are the last four numbers of the serial number?

"A If in fact it is a serial number. I did not physically inspect this vehicle.

"Q You don't know whether or not it is?

"A It could very well be a stock number.

"Q And it could be a vehicle identification number?

"A Incomplete.

"Q But a vehicle identification number; it could be?

"A Incomplete." (R.T. 27, lines 11-20.)

Under direct examination by the respondent, this witness again testified that the last four digits could not be the entire identification or license number (R.T. 37, lines 18-22 to R.T. 38, lines 1-2). Again under direct examination by respondent, this witness answered in the negative the question as to whether or not a complete identification number could consist of four digits (R.T. 40, lines 5-6).

Joseph Calabrese, president of appellant corporation, was called by appellant as a witness. During cross-examination, the following exchange took place:

"Q Would it be fair to say, based on your years of experience, when you see a vehicle identification number, you know what it is?

"A Yes.

"Q Now, these advertisements that we've been speaking of, Exhibits A through D, now except for a couple of exceptions in Exhibit A, all of the ads of specific vehicles contain SER period, then a mark that indicates number, and then they're followed by four digits.

"A Yes.

"Q Now, in these ads, is that the vehicle identification number or only a part of it?

"A To the best of my knowledge, yes.

"Q Is the vehicle identification number merely a part of the number?

"A It is the last four digits of the number?

"Q So it is a part of the number?

"A Yes." (R.T. 52, line 15 to R.T. 53, line 4.)

Appellant calls our attention to the questioning by the hearing officer of witness Robinson as to the usual number of digits appearing in a vehicle identification number (R.T. 39, lines 10-12 and R.T. 40, lines 8-13). From this questioning, appellant argues that it must be concluded the hearing officer actually did not know whether the numbers used in appellant's ads were identification numbers or that the hearing officer was not satisfied with the proof presented by the respondent and deemed it necessary to develop the record himself. Appellant then contends that meeting respondent's burden of proof is not the function of the hearing officer.

These arguments of appellant fail for two reasons. First, the element of its case which respondent did not prove prior to initially resting was adequately proven before the matter stood submitted even without the testimony elicited by the hearing officer. Secondly, while we agree with appellant's assertion that the burden of proof is upon the party asserting the affirmative of an issue, we are aware of no rule, and have been referred to none, which precludes the hearing officer from eliciting testimony from a witness. In fact, we perceive it to be the duty of the hearing officer to discover, within

the framework of the administrative proceedings, all relevant facts to the end that the interests of the public, which are paramount in proceedings of this nature, shall be protected, and the truth ascertained. It is immaterial that the truth elicited favors one side or the other. There is no contention made, and certainly there is no basis in the record for one, that the hearing officer acted unfairly in pursuing his examination of witnesses.

We hold that the findings of the Director are supported by the weight of the evidence.

II. WAS THE DECISION OF THE DIRECTOR OF MOTOR VEHICLES SUPPORTED BY THE FINDINGS?

Appellant makes two contentions to support its position that the decision is not supported by the findings: (1) No finding was made that appellant published any advertisement with intent to mislead prospective customers. (2) There was no finding that using four digits in advertisements, rather than the entire vehicle identification number, related to a "material particular", as that term is used in Section 11713(a) Vehicle Code.

Section 11713(a) Vehicle Code provides that it is unlawful and a violation of the code for one licensed as an automobile dealer "to intentionally publish or circulate any advertising which is misleading or inaccurate in any material particular."

Appellant urges us to construe subsection (a) of Section

11713 V.C. to provide that it is violated only where the advertisement was published by the dealer with the specific intent to mislead prospective customers, or otherwise prevent them from recognizing the vehicle advertised. This argument might well be answered by reference to Section 665 Evidence Code: "A person is presumed to intend the ordinary consequences of his voluntary act," a presumption affecting the burden of proof (Section 660 Evidence Code). However, subsection (a) of Section 11713 V.C. does not, either standing alone or as implemented by the regulations, support the narrow construction contended by appellant. The element of intent is met if it is shown that the dealer or his agent knowingly placed or caused to be placed in the advertisement the material which was misleading or inaccurate, and knowingly caused such advertisement to be published. It need not be proven that the advertisement was specifically intended to mislead or deceive. It was the purpose of the Legislature to protect the public from the effects of misleading advertising, not to punish the dealers for guilty intent in causing the public to be mislead.

The parties stipulated that the advertisements offered into evidence by the respondent were in fact published and that those exhibits were true copies of the material that was published. There was no suggestion that the advertisements found their way into the newspapers by accident, inadvertance

or without appellant's knowledge. On the contrary, appellant's president testified that he and appellant's used car manager prepared the advertisements (R.T. 50, lines 18-19). The evidence is uncontroverted that appellant intended to include only a part of the vehicle identification number in its advertisements and intended that such advertisements be published.

We dismiss as being without merit appellant's contention that the decision is not supported by the findings because there was no finding that the inaccuracies related to a "material particular". The matters which are included in the phrase "material particular" are set forth in 13 Cal. Adm. Code 430.01(a) through (d). Included there as subsection (b) is the language: "The vehicle to be sold." Section 432.01 clearly designates how the vehicle to be sold is to be identified in advertisements. In view of this regulatory scheme, it is unnecessary for the Director to make a specific finding that the publications in issue were defective in a "material particular". Such a "finding" would be a conclusion of law, based upon the ultimate facts which were included in the Director's findings.

We hold that the decision is supported by the findings.

III. IS THE PENALTY IMPOSED BY RESPONDENT COMMENSURATE WITH ITS FINDINGS?

Appellant urges that we should substantially reduce the penalty imposed, even though we hold that the findings are supported by the evidence and that the decision is supported by the findings.

Appellant argues that the penalty is extremely harsh and unjustified in view of: (1) the absence of several findings which appellant has urged are indispensible to proof of its violations, (2) the existence of mitigating circumstances and (3) "appellant's substantial compliance with the statutory scheme in conformance with prevailing community practices."

Appellant had been the focal point of much criticism by the Department of Motor Vehicles because of its advertising practices and had been specifically advised in writing of the provisions of 13 Cal. Adm. Code 432.01 by letter of October 25, 1968, from respondent's manager of Compliance Services (Respondent's Exhibit 2) but chose to place its own "interpretation" upon the clear language of the regulation and elected to place advertising material which did not conform to the law. Appellant's president testified that he was "confused" in 1968 concerning the proper interpretation of Section 432.01 (R.T. 55, line 18 to R.T. 56, line 15). He further testified that he attempted to alleviate his confusion by discussing the requirements of Section 432.01

at "...a few dealer meetings." and with a representative of the newspaper wherein the advertisements were placed, but he "couldn't honestly" say that he ever did inquire of a representative of the Department of Motor Vehicles concerning the proper interpretation of this regulation. (R.T. 57, line 5 to R.T. 58, line 9.)

In our view, appellant flagrantly violated a valid regulation of the Department of Motor Vehicles which was clear and unequivocal and left no room for "construction" by appellant or its fellow-licensees. Appellant's arguments that it relied on community practices or the advice of employees of the press or of fellow-dealers are entirely unpersuasive.

The penalty imposed by the respondent is fair and reasonable in light of the circumstances of the case. It permits appellant the opportunity of continuing its business of selling motor vehicles, providing no further cause for disciplinary action occurs within the ensuing three years.

The Decision of the Director of Motor Vehicles is affirmed.

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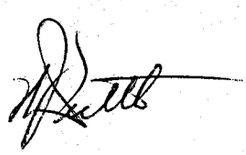

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The penalty imposed by the respondent is fair and reasonable in light of the circumstances of the case. It permits appellant the opportunity of continuing its business of selling motor vehicles, providing no further cause for disciplinary action occurs within the ensuing three years.

The Decision of the Director of Motor Vehicles is affirmed.

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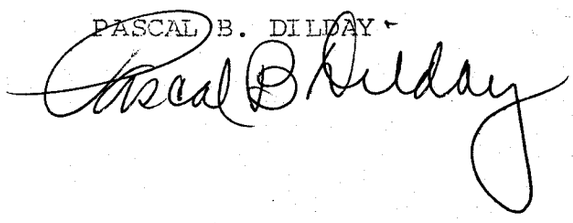

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STATE OF CALIFORNIA

NEW CAR DEALERS POLICY & APPEALS BOARD

In the Matter of PASADENA MOTORS, a California Corporation, Appellant, vs. DEPARTMENT OF MOTOR VEHICLES, Respondent.	Case No. A-8-70 Filed and Served: 28 September 1970

Time and Place of Hearing: August 26, 1970, 1:00 P.M.
100 North Garfield
Pasadena, California

For Appellant: Kadison, Pfaelzer, Woodard & Quinn
By: Joseph A. Murray, Jr.
Attorney at Law
611 West Sixth Street
Los Angeles, CA 90017

For Respondent: Honorable Thomas Lynch
Attorney General
By: Mark Leicester
Deputy Attorney General

FINAL ORDER

In the decision ordered March 9, 1970, by the Director of Motor Vehicles pursuant to Chapter 5, Part 1, Division 3, Title 2 of the Government Code, it was found that appellant: (1) failed in 3 instances to timely give respondent written notice of the transfer of the interest in certain vehicles as required by Section 5901 V.C.; (2) wrongfully and unlawfully failed in 55 instances to mail or deliver to respondent the report of

sale of used vehicles together with such other documents and fees required to transfer registration of the vehicles within the 20-day period allowed by law; (3) wrongfully and unlawfully failed in two instances to mail or deliver to respondent the report of sale of new vehicles together with such other documents and fees required to transfer registration of the vehicles within the 10-day period allowed by law; (4) filed in one instance with respondent a false certificate of non-operation; (5) reported in three instances a date of sale other than the true date of sale on certain motor vehicles; and (6) upon transferring those vehicles described as items 41 through 51 in Exhibit B of the Accusation, "The Department of Motor Vehicles did not ever receive the three-day written notice contemplated by Section 5901, Vehicle Code of California."

It was found by respondent that appellant introduced evidence by way of defense and mitigation of the charges set forth in the Accusation but, with one exception that appellant did not significantly defend or mitigate the charges. The exception relates to the finding that the Department did not ever receive the three-day written notice required by Section 5901 V.C. with respect to the vehicles identified as items 41 through 51 in Exhibit B of the Accusation. In the determination of issues, violation of Section 5901 V.C. was found with respect to three vehicles but no violation thereof was determined to have occurred with respect to the eleven vehicles described

as said items 41 through 51.

The following findings in aggravation were made by respondent:

> "The Department's audit of appellant was commenced on October 28, 1968, and ended November 26, 1968. The review covered the period January 1, 1967, through June 30, 1968, and considered the sales of 2,962 vehicles. The review determined 129 apparent violations of law and rules, not all of which were charged against appellant. All of the 1967 violations were not charged and 24 violations discovered on dates subsequent to June 30, 1968, were added, with the most recent date of sale charged being December 15, 1968.
>
> "Subsequent to December 15, 1968, and through November 26, 1969, a review of the records of the Department of Motor Vehicles indicated that appellant had been involved in 123 misuses involving new vehicle reports of sale and 893 misuses involving used vehicle reports of sale."

It was further found by respondent that appellant had violated the terms of probation set forth in the order of the Director of Motor Vehicles dated November 20, 1967, and that grounds exist to set aside the stay, or a portion thereof, of the suspension of appellant's license, certificate and special plates provided therein.

In the order, respondent modified its order of November 20, 1967, to provide for a suspension of the appellant's license, certificate and special plates for a period of 180 days, with 150 days of the suspension stayed for a period of three years from the effective date of the decision. During the three years, appellant is to remain on probation to respondent and is to obey all laws of the Department of Motor Vehicles

governing the exercise of the license to sell automobiles. The order also provides that if, after giving appellant notice and opportunity to be heard, the Director should determine during the three-year probationary period that a violation of probation has occurred, he may vacate the stay order and impose a suspension or otherwise modify the order. Should appellant faithfully abide by the probationary terms for the three-year period, the order provides that the stay shall become permanent and appellant shall be fully restored to all license privileges.

An appeal was filed with this Board pursuant to Chapter 5, Division 2 of the Vehicle Code.

Appellant has not claimed that the findings of respondent are not supported by the weight of the evidence. However, before considering the issues raised in this appeal, we feel we must comment upon the findings, determination of issues and order as they relate to the vehicles described as items 41 through 51 in Exhibit B of the Accusation. As heretofore stated, although there is a finding of fact that the three-day notice required by Section 5901 V.C. was not received by the Department, and that appellant introduced evidence by way of "defense and mitigation" with reference thereto, there was no determination made in the determination of issues that Section 5901 V.C. was violated with respect to the transfer of those vehicles. Absent such a determination, we conclude

that the penalty ordered was not predicated upon the findings related to those transactions.

Our examination of the law applicable to the manner in which notice may be given to the Department under Section 5901 V.C. leads to the conclusion that clarification through appropriate legislation is indicated. Specifically, we find an apparent hiatus in the law with respect to whether personal service by a licensee upon an employee of the Department at one of its field offices of the notice specified by Section 5901 V.C. satisfies the section, in the light of the provisions of Section 22 V.C. (which provides for the manner of giving notice by the Department), Section 23 V.C. (which provides for the time when notice by personal delivery and notice by mail is complete), Section 5901 V.C. (which provides, in part, that the notice required by that section "shall be upon an appropriate form" provided by the Department), and of the instructions in the form presently provided by the Department, that the notice shall be mailed to the Department addressed to a specified post office box in Sacramento.

In this case respondent introduced the affidavit of a clerk employed by it in Sacramento who had, as one of his official duties, the task of checking the master files of the Division of Registration of the Department. The affidavit declared that he had searched the Department's master files, placed documents relative to this case in manila exhibit folders

and summarized the results of his search in Exhibits A and B. When he failed to find a document in the master files pertaining to a specific item in Exhibits A or B, he placed the word "not" in the appropriate column. An inspection of Exhibit B of the Accusation in this case discloses the word "not" in the column entitled "DEALER NOTICE OF REPORT OF SALE RECEIVED" pertaining to items 41 through 51. There is no assertion by this affiant that he inspected any records other than the respondent's master files in Sacramento, California. This affidavit also discloses that the "Dealer Notice of Report of Sale" forms are included in the Report of Sale books that respondent furnishes to licensed automobile dealers.

The uncontroverted evidence introduced by appellant established that the completed Report of Sale books concerning the transactions involving items 41 through 51, Exhibit B, were "...taken to the DMV office" and left there. (R.T. 57, lines 1-12; R.T. 59, line 22 to R.T. 61, line 10.) The finding that the dealer's notice of report of sale for the 11 transactions in question were not received by the Department is not supported by the weight of the evidence.

Section 5901 V.C. requires that a licensed dealer "...give written notice of the transfer to the Department upon an appropriate form provided by it..." when transferring a vehicle subject to registration. This section does not, however, preclude personal delivery nor does it preclude

delivery to a field office of the Department of Motor Vehicles. It does not provide how the required notice shall be given, although it directs what form shall be used. The general provisions of Sections 22 and 23 V.C. do not fill the void (unless Section 23 V.C. is interpreted to permit personal service on the Department at a field office.) Usually, of course, any notice requirement will be deemed satisfied by personal service, but this is not to say that personal service at a branch office or upon a subordinate employee of a large organization will be deemed to be adequate service upon the organization.

As we have stated, the reverse side of the dealer notice informs the dealer, among other things, that he is to mail the notice not later than the end of the third business day of the dealer. A post office box in Sacramento is also set forth on the reverse side of this form. We are cognizant of a brochure entitled "Dealer's Handbook" which is prepared and distributed by respondent. This publication also directs, at Page 8, that the dealer's notice is to be mailed to the Department headquarters in Sacramento not later than the third business day of the dealer following the date of sale. However, no regulation adopted by respondent pursuant to the Administrative Procedure Act (Government Code 11371 et. seq.) supports the proposition that mailing of the dealer's notice

to department headquarters is the exclusive means and place of notifying the respondent.

Section 1651 V.C. authorizes the respondent to "... adopt and enforce rules and regulations as may be necessary to carry out the provisions of this Code relating to the Department." This section also requires that such rules and regulations be adopted, amended and repealed pursuant to the Administrative Procedure Act. Neither the information on the reverse side of the form nor the information in the Dealer's Handbook meets this statutory requirement. We do have serious doubt that the Department is empowered to adopt such a regulation under the language of the existing statutes and, therefore, remedial legislation may be necessary.

Although the evidence established that written notices pertaining to items 41 through 51, in Exhibit B, were received within the three-day period at a field office of the Department, this does not require modification of the penalty because there was no reference in the determination of issues to items 41 through 51, in Exhibit B, of the Accusation. We need not, and do not, decide whether or not the failure of appellant to mail the notices to respondent at the post office box in Sacramento specified in the notice form might have constituted grounds for disciplinary action.

This brings us to a consideration of the issues raised by appellant.

I. DID RESPONDENT PROCEED IN A MANNER CONTRARY TO LAW?

Appellant argues that respondent proceeded contrary to both the letter and spirit of the law by making "Findings In Aggravation" based upon evidence which was without probative value and incompetent and by failing to give proper weight to certain mitigating factors.

We are of the firm opinion that the evidence in question is probative. It consists of the testimony of a witness called by respondent and examined as to the number of violations by appellant occurring subsequent to December 15, 1968, the date of the last violation charged in the Accusation. The witness testified that he was an employee of the Department of Motor Vehicles and received a report "...sent to me from Sacramento" approximately two days prior to the day the testimony was elicited. This report disclosed that, subsequent to the date of the last transaction charged in the Accusation, appellant failed in 123 instances to timely submit Reports of Sale on new vehicles within the 10-day period provided by law and, further, failed to timely submit Reports of Sale on used vehicles in 893 instances within the 20-day period provided by law. This evidence was offered in rebuttal to the evidence produced by appellant for the purpose of mitigating the charges filed against it.

Keith Conway, president of appellant corporation, had testified, as part of appellant's defense, as to certain

steps taken subsequent to the audit which resulted in the accusation, which were intended to provide safeguards to prevent a reoccurrence of violations of the pertinent statutes and regulations. We are unaware of better means of rebutting this testimony than by producing evidence that the measures appellant adopted for this purpose had failed to achieve the desired result as demonstrated by a later audit of appellant's records.

The evidence of violations after December 15, 1968, also was relevant with respect to fixing penalty for the appellant's alleged violation of the probationary order of November 20, 1967. The accusation charged, and the Director found that appellant was on probation to the Department of Motor Vehicles at the time the violations found in the case before us occurred, and that the violations charged in the accusation were in violation of the terms of probation. In the decision issued by the Director of Motor Vehicles on November 20, 1967, cause for disciplinary action against appellant was found to exist and a 180-day suspension of appellant's license, certificate and special plates was imposed. However, the order of suspension was stayed and appellant was placed on probation for a period of three years under the condition that appellant "shall at all times obey and comply with all of the laws of the United States and of the State of California and all other state,

county, municipal and local laws and ordinances to which he may be subject, and shall obey and comply with all of the rules and regulations of the Department of Motor Vehicles governing his exercise of the privileges to be granted under said license."

Pursuant to this probationary order, respondent was empowered to vacate the stay order and impose a suspension, or a portion thereof, based upon evidence satisfactory to respondent that appellant had violated the terms of the probation. There was no requirement that respondent observe the formalities of the Administrative Procedure Act before modifying this order. The fact that respondent elected to give appellant the benefit of an administrative hearing for a portion of the violations occurring subsequent to respondent's order of November 20, 1967, does not preclude respondent from considering evidence of other violations, occurring subsequent to that order, as a basis for modifying the probationary order.

Appellant's attack on the competency of this evidence is based upon an assertion that the evidence was of "...the most gross form of hearsay evidence" and the admission of the evidence deprived appellant of due process of law. It is a fundamental rule that hearsay admitted in an administrative proceeding which would be objectionable if offered in a judicial proceeding may be relied upon for limited purposes only and

will not support a finding. (Subdivision (c) of Section 11513 Government Code.) However, the limitation arises only if the complaining party makes appropriate and timely objection to its introduction (Savelli v. Board of Medical Examiners, 229 Cal. App. 2d 124; Kirby v. Alcoholic Beverage Control Appeals Board, 8 Cal. App. 3d 1009). An examination of the administrative record shows that appellant had abundant opportunity to require by timely objection a proper foundation for the admission of this hearsay evidence, or in the absence thereof, to restrict the effect of the admission of the evidence by making a motion to strike such evidence or to develop the nature of the hearsay as admissible or inadmissible in a judicial proceeding by appropriate cross examination. Appellant failed to pursue any of these courses.

Appellant argues on appeal that it did not object to the admission of the evidence in question because the hearing officer characterized it as hearsay and, therefore, an objection by appellant would have been redundant. The argument that appellant can use a certain statement of the hearing officer in lieu of a proper objection is without merit.

While the hearing officer did state, "Well, you are giving us hearsay information then.", (R.T. 74, line 11) he did not characterize the testimony as being hearsay inadmissible in a judicial proceeding. The evidence in question may very well have

been admissible in a judicial proceeding under an exception to the hearsay rule; e.g., as business or official records. Had objection been made, respondent would then have had the opportunity to lay proper foundation for its admissibility under the exception. Thus, a statement by the hearing officer that evidence was hearsay cannot be considered a committment that such evidence would be treated as inadmissible in a judicial proceeding. Quite to the contrary, the hearing officer might well have pointed out that this evidence was hearsay in order to alert appellant to its right to object, or to examine the witness to determine whether or not the evidence was admissible in a judicial proceeding as an exception to the hearsay rule. Appellant did not examine the witness, on voir dire or cross examination. Had such examination been made, perhaps it would have afforded grounds for imposition of the limitation applicable to hearsay inadmissible in a judicial proceeding.

The rule is discussed at length in Kirby v. Alcoholic Beverage Control Appeals Board, supra, at pages 1018 to 1020.

Appellant argues on appeal that it was denied due process of law in that the administrative hearing was not conducted impartially. This contention is based on the theory that evidence produced by appellant to mitigate the charges was not considered by the hearing officer to be of a mitigating nature. The hearing officer considered much of the evidence

as merely explanatory of some of the difficulties faced by one licensed to sell automobiles and he also concluded that all of these difficulties are "...controllable by the licensee with the necessary effort and care."

We agree that the difficulties experienced by the appellant are matters within the control of the appellant. Appellant elected to sell motor vehicles without assurance that titling documents would be in its possession within the 10- or 20-day period allowed by law. Mr. Keith Conway, appellant's president, testified that when appellant sells a car, it isn't known whether appellant has received title to the car or not; that a car is up for sale when paid for by appellant and in its possession, and that he makes no attempt to hold vehicles from resale until clear title is obtained (R.T. 68, lines 1-20). As we said in Fletcher Chevrolet, Incorporated v. Department of Motor Vehicles, A-4-69, "If the appellant wishes to avoid disciplinary action by the Department based on untimely filing of Reports of Sale, it is incumbent upon appellant to pursue business practices which do not preclude following the above cited rules and regulations."

There is no basis in the administrative record to support the contention that the hearing officer or the Director of Motor Vehicles acted other than impartially and, therefore, the argument that appellant was denied due process of law

on this ground must fail.

II. IS THE PENALTY IMPOSED BY THE DIRECTOR OF MOTOR VEHICLES COMMENSURATE WITH HIS FINDINGS?

Appellant contends that the penalty imposed is harsh in that: (1) the number of violations are minimal compared to the overall record, (2) as a practical matter, violations of Sections 5901 and 4456 V.C. are unavoidable and, (3) no one was injured by the failure of appellant to comply with the rules.

Appellant's arguments reveal an attitude toward the law regulating its business which accounts for its present difficulties and promises little for avoidance of future violations. In advancing these arguments now, appellant obviously places little or no importance upon the circumstance that appellant was under a probationary order issued by the Director of Motor Vehicles at the time the violations in this case occurred. It had previously been disciplined for similar violations but the Director of Motor Vehicles saw fit to afford appellant the privilege of probation. Appellant abused this privilege by continuing business practices which placed it in a position of being unable to comply with the conditions of probation. We do not agree that the untimely filing of 63 documents required by statute and the filing of incorrect data in four instances can be characterized as "minimal."

With regard to the contention that violations of Sections 5901 and 4456 V.C. are unavoidable as a practical matter, we said in Fletcher Chevrolet, Inc. v. Department of Motor Vehicles, A-4-69, at pages 9-10:

> "This Board recognizes that strict compliance with the 10- and 20-day rules may be inconvenient or even difficult in some situations. However, the Legislature and the department have established these rules, and it is not the function of this Board, sitting in its appellate capacity, to modify them.
>
> "That power resides in the Legislature and the department."

We might add that it is certainly not the function of a licensee to ignore these rules.

At page 11 on its Opening Brief, appellant argues "...although the Three Dollar ($3.00) misuse fee may not be sufficient penalty where the violation is due to wilful misconduct, it is sufficient penalty where circumstances are beyond appellant's, or any other dealer's, control." We were confronted with a similar argument in Ralph's Chrysler-Plymouth v. Department of Motor Vehicles, A-3-69, and disposed of it by holding that the argument "...does violence to the legislative scheme created for the express purpose of assuring that documents of title to motor vehicles are handled in an orderly manner to the end that transfers of ownership of motor vehicles become a matter of public record in a reasonable time."

Appellant's contention that the penalty imposed in this case is especially harsh because no one was injured by the

failure of appellant to comply with the rules is likewise without merit. It entirely disregards the rights of innocent purchasers of motor vehicles and the need for accurate and timely public recordation of interests in motor vehicles. We are not involved with a case wherein a party is seeking recovery for damages in a civil matter. We are involved with determining whether one granted authority by the State of California to carry on a particular business should or should not be afforded the opportunity of pursuing that business. We find nothing in the law which requires respondent to make a showing of specific injury to a particular buyer before it can find a violation of the statutes involved in this case. We discussed at some length in Bill Ellis, Inc. v. Department of Motor Vehicles, A-2-69, the need for accurate and timely compliance on the part of licensed dealers with the laws governing the registration of motor vehicles and we concluded, at page 12, that the Legislature must have been firmly of the opinion that meeting "...the reporting requirements is indispensible to the orderly management of documents related to the ownership of motor vehicles and that such management is a matter of importance to the public welfare." Moreover, in our view, the evidence did show substantial injury to those buyers who, by reason of appellant's failure to assure availability of valid title to vehicles it sold, were placed in jeopardy of losing the vehicles they had purchased from appellant in good

faith. In one instance, appellant failed to obtain title to a car it sold in June 1968 until April 1969. There would seem to be a reasonable inference that that buyer was worried, upset, vexed and frustrated during this long period of uncertainty, to say nothing of being exposed to possible liability for conversion of the vehicle. Unfortunately automobile dealers, like other business concerns, can and do suffer financial failure. Had appellant failed in the instance cited, the buyer would have lost $1500.00, the payoff due the Colorado Bank which, as appellant finally learned, was the legal owner of the vehicle in question.

Appellant informs us that a 30-day suspension will cause it to suffer "economic bankruptcy" and that the registration laws "...are not designed nor intended to force out of business those who innocently are unable to comply with such laws."

We have already pointed to the fallacy of the "innocent" and "unable" arguments, and dispose of this contention by pointing out it is most doubtful that the affluence, or lack thereof, of a licensee is a proper matter to consider when fixing penalty. Does appellant seriously suggest that on a given set of facts, a licensee who could afford a given period of suspension should be subject to license suspension, but that the penalty should not apply if the licensee were less well financed? In any event, the administrative record is entirely

devoid of evidence of appellant's financial status and that argument must be rejected.

The penalty imposed by respondent is just and reasonable in light of the findings. Appellant had an opportunity to demonstrate its ability and willingness to pursue practices which would assure adherence to applicable statutes and regulations; appellant failed to do so. The evidence in this case shows substantial indifference on the part of appellant to the terms of its probation and failure or refusal to comprehend its responsibilities to the public under our law. The former penalty imposed by the Director of Motor Vehicles did not succeed in impressing upon appellant the fact that a licensee's disregard of the public interest cannot be tolerated. The suspension of its authority to sell automobiles was not only reasonable but also most appropriate to the circumstances of the case.

The Decision of the Director of Motor Vehicles is affirmed.

This Final Order shall be effective when served upon the parties. The thirty (30) day suspension ordered under paragraph 1, commencing at page 6 of the Director's Decision of March 9, 1970, shall commence on the fourteenth (14th) day following the effective date of this order, or on such earlier date as may be fixed by the Director of Motor Vehicles.

WARREN BIGGS, President

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Pasadena Motors vs. Department of Motor Vehicles

Appeal No. A-8-70

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STATE OF CALIFORNIA

NEW CAR DEALERS POLICY & APPEALS BOARD

In the Matter of FRANK B. DENIS, dba DENIS DODGE, Appellant, vs. DEPARTMENT OF MOTOR VEHICLES, Respondent.	Case No. A-9-70 Filed: January 4, 1971

Time and Place of Hearing:	December 9, 1970, 11:15 A.M. 2415 First Avenue Sacramento, California
For Appellant:	Law Offices of C. Ray Robinson by: William Ivey, Jr. Attorney at Law 650 West 19th Street Merced, CA 95340
For Respondent:	Honorable Thomas Lynch Attorney General by: Richard L. Hamilton Deputy Attorney General

FINAL ORDER

In the Decision ordered March 5, 1970, by the Director of Motor Vehicles, pursuant to Chapter V, Part 1, Division 3, Title 2, of the Government Code, it was found that appellant: (1) Failed in 28 instances to give respondent written notice of the transfer of the interest in certain vehicles within the time

specified by Section 5901 Vehicle Code; (2) wrongfully and unlawfully failed in 5 instances to mail or deliver to respondent the report of sale of used vehicles, together with other documents and fees required to transfer registration of the vehicles, within the 20-day period allowed by law; (3) wrongfully and unlawfully failed in 1 instance to mail or deliver to respondent the report of sale of a new vehicle, together with other documents and fees required to transfer registration of the vehicle, within the 10-day period allowed by law; (4) in 6 instances, filed with the respondent a false certificate of non-operation of certain vehicles; (5) disconnected, turned back, or reset the odometer on 4 vehicles in order to indicate a reduced mileage thereon.

It was further found by respondent that appellant, during the period of the aforementioned occurrences, was personally involved in several business enterprises and that the dealership was managed and operated by employees to a substantial degree.

On each of the findings involving the untimely reporting to respondent and the filing of false certificates of non-operation, appellant's license, certificate and special plates were ordered suspended for a period of 45 days, all to commence on the effective date of respondent's order. In addition thereto, appellant's license, certificate and special plates were ordered revoked, separately and severally, for each

of the four findings involving the altering the mileage indicated on odometers.

An appeal was filed with this board pursuant to Chapter 5, Division 2 of the Vehicle Code, alleging that: (1) The findings are not supported by the weight of the evidence in light of the whole record; (2) the Decision is not supported by the findings; and (3) the penalty is not commensurate with the findings.

At the administrative hearing, appellant admitted all matters charged in the Accusation. With an abundance of caution, the hearing officer ascertained that appellant was fully aware of the possible consequences of these stipulations (R.T. 4, line 27 to R.T. 7, line 9). On appeal, appellant did not ask to be relieved of these admissions and appellant conceded that the penalty imposed did not constitute an abuse of discretion on the part of respondent. Appellant took the position that the findings of respondent were deficient because there was no finding that appellant: (1) was not personally aware that the unlawful acts occurred; (2) took corrective action upon learning of such acts; (3) cooperated with respondent's investigators; and (4) that persons wronged by appellant's misconduct continued to do business with appellant.

Appellant cites no authority for the proposition that respondent had a duty to make findings of fact on matters which might be of a mitigating nature. Administrative findings must satisfy the dual requirements of making

intelligent review by a court possible and apprising parties of the bases for administrative action. They are sufficient if they set forth the specific grounds upon which the agency based its decision (Savelli v. Board of Medical Examiners, 229 Cal.App.2nd 124). The findings of the Director of Motor Vehicles clearly meet this test.

I. IS THE PENALTY IMPOSED BY THE DIRECTOR OF MOTOR VEHICLES COMMENSURATE WITH HIS FINDINGS?

We answer this question in the affirmative. In addition to demonstrating a disregard for the laws governing a dealer's obligation to timely and truthfully report certain facts to the Department of Motor Vehicles, appellant engaged in a course of conduct designed to victimize innocent purchasers of motor vehicles. The preponderance of the evidence establishes that appellant was personally aware of the resetting of odometers on automobiles in his inventory, and that he personally directed that odometers be reset. Respondent found that appellant "caused" this unlawful practice to occur and we agree with that finding.

One licensed by the State of California is under a high duty to avoid conduct of a fraudulent nature in the pursuit of the licensed business and to report certain facts timely and accurately to respondent. Appellant fell far short of meeting this standard. We find no bases in the record

before us which would warrant a reduction of the penalty. Permitting this licensee to continue in the business of selling motor vehicles would be inimical to the public welfare.

The Decision of the Director of Motor Vehicles is affirmed and shall be effective on the eighteenth day following the date this Final Order is filed.

# # #

WARREN BIGGS, President

ROBERT B. KUTZ

GILBERT D. ASHCOM

PASCAL B. DILDAY

RALPH L. INGLIS

MELECIO H. JACABAN

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WINFIELD J. TUTTLE

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Denied

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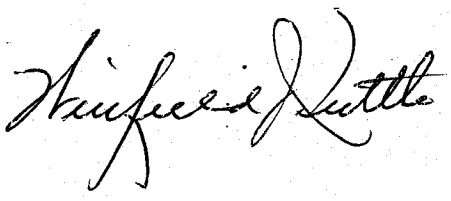

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WINFIELD J. TUTTLE

STATE OF CALIFORNIA

NEW CAR DEALERS POLICY & APPEALS BOARD

In the Matter of STATEWIDE AUTO WHOLESALE, INC. dba FREEWAY CHRYSLER PLYMOUTH, Appellant, vs. DEPARTMENT OF MOTOR VEHICLES, Respondent.	)	Case No. A-10-70 Filed and Served: 16 November 1970

Time and Place of Hearing: October 21, 1970, 11:00 A.M.
350 McAllister Street
San Francisco, California

For Appellant: Johnson & Borgman
By: J. C. Borgman
Attorney at Law
3126 Buskirk Avenue
Walnut Creek, CA 94596

For Respondent: Honorable Thomas Lynch
Attorney General
By: Victor D. Sonenberg
Deputy Attorney General

FINAL ORDER

In the decision ordered April 6, 1970, by the Director of Motor Vehicles pursuant to Chapter 5, Part 1, Division 3, Title 2 of the Government Code, it was found that appellant: (1) Wrongfully and unlawfully failed in 3 instances to mail or deliver to respondent the report of sale of used vehicles together with such other documents and fees required to transfer registration of the vehicles within the 20-day

period allowed by law; (2) failed in one instance to affix the operating copy of the report of sale and the paper license plate to a vehicle at the time the vehicle was delivered to the purchaser; (3) employed as a vehicle salesman one not licensed as a vehicle salesman; (4) failed in 3 instances to withdraw advertisements of certain motor vehicles within 48 hours after those motor vehicles were sold or withdrawn from sale; (5) caused advertisements of motor vehicles to be published that were misleading and inaccurate in material particulars, in that the advertisement of a monthly payment to be assumed following payment of a handling fee led members of the public to believe they could receive the benefits of an existing loan, when, in fact, purchase of the vehicles would require the making of a new loan; (6) caused to be published in a newspaper advertisements for the sale of specific motor vehicles without identifying those vehicles by either the vehicle license number or the vehicle identification number.

It was found by respondent that appellant introduced evidence to prove that: (1) Appellant was a volume dealer, having sold approximately 1500 cars during 1968 and even a larger number during 1969; (2) appellant experienced some difficulty in working out its system with newspaper advertising departments for cancelling ads of vehicles when the vehicles had been sold but eventually developed

forms to be sent to the involved newspapers. In a few instances, the advertisements for automobiles sold late Thursday afternoon could not be withdrawn from the Sunday edition of the newspaper by written notification. However, this could be accomplished by making a telephone call to the newspaper on Friday morning; (3) no copy proof was delivered or received by appellant prior to publication with reference to the ads not containing either the vehicle license number or the vehicle identification number; (4) the unlicensed salesman employed by appellant had been licensed at one time but said license was revoked because of the revocation of his driver's license. Two or three weeks prior to the hearing, the vehicle salesman's license was reinstated.

The penalty imposed suspended appellant's license, certificate and special plates for a period of 15 days, with the execution of the suspension ordered stayed for a period of two years upon the condition that the appellant obey all the laws of the United States, the State of California and its political subdivisions, and all the rules and regulations of the Department of Motor Vehicles. It was further ordered that the Director of Motor Vehicles may, during the two year period and after giving appellant notice and opportunity to be heard, vacate the stay order

and impose the suspension or a portion thereof upon evidence satisfactory to the Director that cause for disciplinary action has occurred. If such action is not taken by the Director during the two-year period, the stay is to become permanent and appellant restored to all of its license privileges.

An appeal was filed with this board pursuant to Chapter 5, Division 2 of the Vehicle Code, alleging that: (1) The Decision of the Director of Motor Vehicles is not supported by the findings and the findings are not supported by the weight of the evidence; (2) the penalty provided in the Decision of the Director of Motor Vehicles is not commensurate with the findings.

I. ARE THE FINDINGS OF THE DIRECTOR OF MOTOR VEHICLES SUPPORTED BY THE WEIGHT OF THE EVIDENCE IN THE LIGHT OF THE WHOLE RECORD REVIEWED IN ITS ENTIRETY?

It is not necessary to discuss the evidence produced by the respondent to support the finding that appellant employed and delegated the duties of a vehicle salesman to one George Holden who had not been licensed as a vehicle salesman or the finding that appellant caused advertisements of automobiles to be published in newspapers without identifying the vehicles so advertised by either the vehicle license identification number or license number; appellant concedes that these findings are properly supported. Appellant contends that the remaining findings of respondent

are not supported by the weight of the evidence.

We agree with appellant's contention that respondent has not proven a failure on the part of appellant to mail or deliver to the Department of Motor Vehicles documents and fees necessary to transfer registration of the vehicles described as Items 1 and 7 in Exhibit A, attached to the Accusation.

Respondent's Exhibits 11 and 17 establish that vehicles described in Item 1 and Item 7 of Exhibit A of the Accusation were sold on 7/4/68 and 7/17/68, respectively, but there is no evidence in the record that appellant failed to mail or deliver to the Department the documents necessary to transfer registration of the vehicles as found by respondent. Therefore, we reverse respondent as to its findings in this regard.

The evidence that the documents and fees necessary to transfer registration of the vehicle identified in Item 4 of Exhibit A is sufficient to support the finding that said documents and fees were not submitted to the Department of Motor Vehicles within the 20 days allowed by law. Respondent's Exhibit 13 contains the "Dealer Notice" which shows the vehicle was sold on 7/11/68. Also contained within Exhibit 13 is a certified copy of the appropriate Certificate of Ownership and stamped on the reverse side of that document is the date of 9/5/68. This board takes official notice that the

date stamped on the reverse side of the Certificate of Ownership reflects the date that the titling documents were received by the Department of Motor Vehicles for the purpose of transferring registration of the vehicle.

We need not discuss the hearsay question raised by the appellant concerning the affidavit of Richard Griffin, the buyer of the vehicle identified in Item 4 of Exhibit A, because the charge is proven without reference to that affidavit.

The evidence is conflicting concerning the finding that appellant failed to affix at the time of delivery the operating copy of the report of sale and the paper license plate to the vehicle sold to Gaylon G. or Deanne D. Bickford. The Director of Motor Vehicles resolved the conflict adversely to the appellant and we are presented with no evidence or argument which would compel a reversal of this finding.

Appellant contends the evidence does not support the finding that it failed in 4 instances to withdraw advertisements via a writing within 48 hours after the vehicles advertised were sold or withdrawn from sale pursuant to Section 11713(c) Vehicle Code. Appellant argues that respondent's "...evidence consisted entirely of merely showing that the ads had been published 48 hours after the car was sold."

Section 11713(c) Vehicle Code provides that it is unlawful and a violation of the Vehicle Code for a dealer "To fail within 48 hours in writing to withdraw any advertisement of a vehicle that has been sold or withdrawn from sale." Appellant calls our attention to some colloquy during the administrative proceedings concerning the proper interpretation of that section and suggests the statute has caused much confusion. The question was raised as to whether the statute imposes a duty upon the dealer to have the advertisement withdrawn from publication within 48 hours after the vehicle advertised is sold or withdrawn from sale or whether it merely imposes upon the dealer a duty to notify the publisher via a writing within the 48-hour period that the advertisement is to be canceled. Appellant contends that the latter interpretation is correct. We concur with this interpretation of appellant, but it is clear that the respondent, both in the administrative proceedings and before this board, also interpreted the statute in that manner. There is no contention made by respondent that a dealer should be subject to disciplinary action if a publisher fails to respond in time to his cancellation order. Had respondent taken the position that statute requires a dealer to have the ad withdrawn from publication within the 48-hour period, respondent would

merely have sought to prove the date the vehicle was sold or withdrawn from sale and the date the vehicle was last advertised. Respondent, however, went beyond this and proved that the records of the Oakland Tribune did not contain any indication that appellant had submitted a writing to the newspaper directing that the ads in question be canceled.

One could not seriously contend that the Legislature intended that a dealer be held responsible for the acts or omissions of a newspaper publisher over which the dealer has no control. The issue before us is not whether the publisher did or did not respond to appellant's cancellation order, but whether appellant did or did not submit such order timely and in the written form.

Testimony from appellant's witnesses supports the finding that appellant failed to follow the mandate of Section 11713(c) Vehicle Code. The advertisements of the vehicles described as Items 2, 3, 4 and 8 in Exhibit A were published in one or more newspapers during the first half of July 1968. Appellant's sales manager testified under cross-examination that advertisements placed by appellant were "probably" being canceled only by telephone calls in July 1968 (Vol. 2, R.T. 14, lines 5-7). While there was testimony produced by appellant that it commenced using a system wherein postcards were used to cancel ads,

appellant's sales manager testified that this procedure commenced approximately 10 months prior to the administrative hearing, which made the inauguration of the use of postcards well after the publication of the ads in question (Vol. 2, R.T. 14, lines 8-9).

Furthermore, another witness called by appellant, a classified advertising salesman for the Contra Costa Times during 1968 and 1969, testified under cross-examination that he started receiving written cancellations of advertisements from appellant shortly after receiving a copy of a letter from the Department of Motor Vehicles addressed to dealers; this letter was received sometime in August of 1968 (Vol. 2, R.T. 34, lines 14-26).

The evidence clearly supports the finding that appellant failed to cancel advertisements placed by appellant for those vehicles described as Items 2, 3, 4 and 8 of Exhibit A in writing within the time specified in Section 11713(c) Vehicle Code.

Respondent found that appellant committed acts in violation of Section 11713(a) Vehicle Code in July 1968 by publishing in two newspapers advertisements of automobiles that were misleading and inaccurate in material particulars, namely that the buyer could "assume" a monthly payment, following payment of a "handling fee" which falsely led members of the public to believe they could receive the

benefits of existing loans on the vehicles. For example, a portion of an advertisement offering a 1960 Thunderbird for sale included the language, "Pay $28 and assume $38 per month." Appellant attacks this finding by contending that: (1) Respondent did not meet its burden of proof in that it did not show that appellant's advertising was misleading in material particulars and (2) respondent did not present evidence that there are benefits in an existing loan, or at least that prospective customers were informed or thought there were benefits to be received from an existing loan.

Section 11713(a) Vehicle Code does not in any way define "material particulars" and, at the time the advertisements in question were published, respondent had not defined the term through its regulatory powers. However, in a contract for sale of an automobile, it is obvious that the method of financing the purchase price is a "material particular". It is common knowledge that automobiles are frequently purchased on a deferred payment plan and that the buyer frequently looks to the seller for assistance in arranging for the deferred financing when the vehicle is purchased from an automobile dealer. The amount of the down payment and the amount and number of monthly payments is as important to the buyer who cannot pay cash for a vehicle as the make, condition and price of the vehicle.

There is no burden upon respondent to prove any benefits inure to a buyer who assumes an existing loan. The question is whether reference in an advertisement to the payment of a handling fee and assuming a monthly payment would lead the reader of the advertisement to believe that he would be benefited by such an arrangement. This question is well answered by the following excerpt from Respondent's Reply Brief:

> "Clearly, the words 'assume a monthly payment', when used in connection with an offer to sell a used car, reasonably conveys the idea that there has already been some previous monthly payment made toward the balance of the purchase price. ...this is clearly a 'benefit' of an existing loan. And appellant's ads further enhanced the idea of 'benefit' from an existing loan by specifying a small amount for a 'handling fee'. Here the obvious implication is that the down-payment had already been satisfied in connection with the existing loan, and all that was required was a minimal fee for administrative cost. Thus, whether or not in any given case there actually is a 'benefit' involved in an existing loan, the ads in question certainly conveyed the idea that a benefit was available in the form of some payment already made by a prior owner."

Respondent proved publication of the advertisements containing the objectionable language and the fact that none of the vehicles so advertised had existing loans which could be assumed. These were the elements regarding this aspect of its case necessary for respondent to prove. Although respondent elected to go further and proved that some readers of the advertisements were misled as to the

terms of financing of the automobile, doing so was unnecessary in view of the language in Webster vs. Board of Dental Examiners, 17 Cal.2nd 534, 541, that:

> "...the evils of deceptive advertising cannot be reached effectively if legislation to that end is interpreted to require proof of actual reliance upon a false statement knowingly made, as in a common law action in deceit."

We find that the evidence produced by respondent was sufficient to support Finding VIII of the Decision of the Director of Motor Vehicles.

II. IS THE PENALTY IMPOSED BY THE DIRECTOR OF MOTOR VEHICLES COMMENSURATE WITH HIS FINDINGS?

Appellant argues that the penalty imposed is much too harsh even though this board holds that the findings of respondent are supported by the evidence. Appellant contends that some of the violations are of a technical or of a de minimus nature and that one was based upon an ambiguous statute. Appellant further argues that the violations concerning the advertising of vehicles in such a way that one would be led to believe that the vehicle could be purchased under an existing loan "...appears to be the only type of violation involved that the revocation penalties could possibly apply."

The evidence concerning the employment of the unlicensed salesman indicated that appellant held little or no respect for the requirements of the law; the unlawful employment was continued by appellant even after the July 28, 1969, Accusation and until only two or three weeks before the administrative

hearing on November 20, 1969. This board was not favorably impressed with appellant's contention that it was unaware that the salesman was unlicensed. Appellant was charged with the duty of determining that he was licensed when it employed him. The reason for the revocation of the salesman's license was entirely immaterial and in no manner excused appellant from continuing the unlawful employment, particularly during the period after being charged with the violation by the Department's Accusation.

Although we do not dismiss the remaining violations as being insignificant, we are of the opinion that the false and misleading advertising violations are of serious consequence.

The evidence clearly shows that appellant put into operation and maintained a scheme designed to mislead the public, and caused advertisements of a false and misleading nature to be published in newspapers. The ads referred the reader to a named person and gave a telephone number different from the telephone number listed in appellant's other advertisements. The advertisements did not disclose appellant's name. The phone number was that of an answering service. Appellant's agent returned the calls and, in several instances, informed the prospective buyers responding to the ads that the vehicles had been repossessed (Volume 1, R.T. 20, 24, 26, 33 and 49). This was a deliberate falsehood; the

vehicles had not been repossessed. This was established not only by respondent's direct evidence but also by the testimony of appellant's finance manager (Vol. 2, R.T. 38, lines 19-24).

We are unimpressed with appellant's arguments that respondent should have informed appellant that its advertisements were objectionable. There are situations wherein reasonable men may differ as to whether or not certain advertisements are of a false or misleading nature. When such opportunity for confusion exists, perhaps a warning or other clarifying device should be provided by the enforcing agency prior to proceeding with disciplinary action. However, on the facts in this case, no reasonable man could harbor any doubt as to whether the ads would or would not convey to the public a false message. A warning in this case was not indicated.

We do not find the penalty imposed by respondent too severe. It gives appellant the opportunity to continue in the business of selling automobiles, providing appellant abides by the laws governing the conduct of such business. Appellant purports to have a sincere desire to follow the law and regulations of the Department of Motor Vehicles with reference to advertising vehicles. The two-year probationary period imposed in this case will give appellant

adequate opportunity to demonstrate its ability and desire to do so.

With respect to Items 1 and 7 of Exhibit A, attached to the Accusation, and by reference made a part of Finding III of the Decision of the Director of Motor Vehicles, the Decision is reversed. In all other respects, the Decision is affirmed.

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WARREN BIGGS, President

ROBERT B. KUTZ

GILBERT D. ASHCOM

PASCAL B. DILDAY

MELECIO H. JACABAN

MRS. AUDREY B. JONES, Vice President

ROBERT B. NESEN

adequate opportunity to demonstrate its ability and desire to do so.

With respect to Items 1 and 7 of Exhibit A, attached to the Accusation, and by reference made a part of Finding III of the Decision of the Director of Motor Vehicles, the Decision is reversed. In all other respects, the Decision is affirmed.

# # #

WARREN BIGGS, President

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Gilbert D. Ashcom

GILBERT D. ASHCOM

PASCAL B. DILDAY

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ROBERT B. NESEN

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With respect to Items 1 and 7 of Exhibit A, attached to the Accusation, and by reference made a part of Finding III of the Decision of the Director of Motor Vehicles, the Decision is reversed. In all other respects, the Decision is affirmed.

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WARREN BIGGS, President

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MRS. AUDREY B. JONES, Vice President

ROBERT B. NESEN

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With respect to Items 1 and 7 of Exhibit A, attached to the Accusation, and by reference made a part of Finding III of the Decision of the Director of Motor Vehicles, the Decision is reversed. In all other respects, the Decision is affirmed.

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WARREN BIGGS, President

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GILBERT D. ASHCOM

PASCAL B. DILDAY

MELECIO H. JACABAN

MRS. AUDREY B. JONES, Vice President

ROBERT B. NESEN

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With respect to Items 1 and 7 of Exhibit A, attached to the Accusation, and by reference made a part of Finding III of the Decision of the Director of Motor Vehicles, the Decision is reversed. In all other respects, the Decision is affirmed.

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ROBERT B. NESEN

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With respect to Items 1 and 7 of Exhibit A, attached to the Accusation, and by reference made a part of Finding III of the Decision of the Director of Motor Vehicles, the Decision is reversed. In all other respects, the Decision is affirmed.

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ROBERT B. NESEN

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# # #

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GILBERT D. ASHCOM

PASCAL B. DILDAY

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ROBERT B. NESEN

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WARREN BIGGS, President

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GILBERT D. ASHCOM

PASCAL B. DILDAY

MELECIO H. JACABAN

Audrey B Jones

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ROBERT B. NESEN

STATE OF CALIFORNIA

NEW CAR DEALERS POLICY & APPEALS BOARD

In the Matter of STATEWIDE AUTO WHOLESALE, INC. dba FREEWAY CHRYSLER PLYMOUTH, Appellant, vs. DEPARTMENT OF MOTOR VEHICLES, Respondent.	)	Case No. A-10-70 Filed and Served: 16 November 1970

Time and Place of Hearing: October 21, 1970, 11:00 A.M.
350 McAllister Street
San Francisco, California

For Appellant: Johnson & Borgman
By: J. C. Borgman
Attorney at Law
3126 Buskirk Avenue
Walnut Creek, CA 94596

For Respondent: Honorable Thomas Lynch
Attorney General
By: Victor D. Sonenberg
Deputy Attorney General

FINAL ORDER

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period allowed by law; (2) failed in one instance to affix the operating copy of the report of sale and the paper license plate to a vehicle at the time the vehicle was delivered to the purchaser; (3) employed as a vehicle salesman one not licensed as a vehicle salesman; (4) failed in 3 instances to withdraw advertisements of certain motor vehicles within 48 hours after those motor vehicles were sold or withdrawn from sale; (5) caused advertisements of motor vehicles to be published that were misleading and inaccurate in material particulars, in that the advertisement of a monthly payment to be assumed following payment of a handling fee led members of the public to believe they could receive the benefits of an existing loan, when, in fact, purchase of the vehicles would require the making of a new loan; (6) caused to be published in a newspaper advertisements for the sale of specific motor vehicles without identifying those vehicles by either the vehicle license number or the vehicle identification number.

It was found by respondent that appellant introduced evidence to prove that: (1) Appellant was a volume dealer, having sold approximately 1500 cars during 1968 and even a larger number during 1969; (2) appellant experienced some difficulty in working out its system with newspaper advertising departments for cancelling ads of vehicles when the vehicles had been sold but eventually developed

forms to be sent to the involved newspapers. In a few instances, the advertisements for automobiles sold late Thursday afternoon could not be withdrawn from the Sunday edition of the newspaper by written notification. However, this could be accomplished by making a telephone call to the newspaper on Friday morning; (3) no copy proof was delivered or received by appellant prior to publication with reference to the ads not containing either the vehicle license number or the vehicle identification number; (4) the unlicensed salesman employed by appellant had been licensed at one time but said license was revoked because of the revocation of his driver's license. Two or three weeks prior to the hearing, the vehicle salesman's license was reinstated.

The penalty imposed suspended appellant's license, certificate and special plates for a period of 15 days, with the execution of the suspension ordered stayed for a period of two years upon the condition that the appellant obey all the laws of the United States, the State of California and its political subdivisions, and all the rules and regulations of the Department of Motor Vehicles. It was further ordered that the Director of Motor Vehicles may, during the two year period and after giving appellant notice and opportunity to be heard, vacate the stay order

and impose the suspension or a portion thereof upon evidence satisfactory to the Director that cause for disciplinary action has occurred. If such action is not taken by the Director during the two-year period, the stay is to become permanent and appellant restored to all of its license privileges.

An appeal was filed with this board pursuant to Chapter 5, Division 2 of the Vehicle Code, alleging that: (1) The Decision of the Director of Motor Vehicles is not supported by the findings and the findings are not supported by the weight of the evidence; (2) the penalty provided in the Decision of the Director of Motor Vehicles is not commensurate with the findings.

I. ARE THE FINDINGS OF THE DIRECTOR OF MOTOR VEHICLES SUPPORTED BY THE WEIGHT OF THE EVIDENCE IN THE LIGHT OF THE WHOLE RECORD REVIEWED IN ITS ENTIRETY?

It is not necessary to discuss the evidence produced by the respondent to support the finding that appellant employed and delegated the duties of a vehicle salesman to one George Holden who had not been licensed as a vehicle salesman or the finding that appellant caused advertisements of automobiles to be published in newspapers without identifying the vehicles so advertised by either the vehicle license identification number or license number; appellant concedes that these findings are properly supported. Appellant contends that the remaining findings of respondent

are not supported by the weight of the evidence.

We agree with appellant's contention that respondent has not proven a failure on the part of appellant to mail or deliver to the Department of Motor Vehicles documents and fees necessary to transfer registration of the vehicles described as Items 1 and 7 in Exhibit A, attached to the Accusation.

Respondent's Exhibits 11 and 17 establish that vehicles described in Item 1 and Item 7 of Exhibit A of the Accusation were sold on 7/4/68 and 7/17/68, respectively, but there is no evidence in the record that appellant failed to mail or deliver to the Department the documents necessary to transfer registration of the vehicles as found by respondent. Therefore, we reverse respondent as to its findings in this regard.

The evidence that the documents and fees necessary to transfer registration of the vehicle identified in Item 4 of Exhibit A is sufficient to support the finding that said documents and fees were not submitted to the Department of Motor Vehicles within the 20 days allowed by law. Respondent's Exhibit 13 contains the "Dealer Notice" which shows the vehicle was sold on 7/11/68. Also contained within Exhibit 13 is a certified copy of the appropriate Certificate of Ownership and stamped on the reverse side of that document is the date of 9/5/68. This board takes official notice that the

date stamped on the reverse side of the Certificate of Ownership reflects the date that the titling documents were received by the Department of Motor Vehicles for the purpose of transferring registration of the vehicle.

We need not discuss the hearsay question raised by the appellant concerning the affidavit of Richard Griffin, the buyer of the vehicle identified in Item 4 of Exhibit A, because the charge is proven without reference to that affidavit.

The evidence is conflicting concerning the finding that appellant failed to affix at the time of delivery the operating copy of the report of sale and the paper license plate to the vehicle sold to Gaylon G. or Deanne D. Bickford. The Director of Motor Vehicles resolved the conflict adversely to the appellant and we are presented with no evidence or argument which would compel a reversal of this finding.

Appellant contends the evidence does not support the finding that it failed in 4 instances to withdraw advertisements via a writing within 48 hours after the vehicles advertised were sold or withdrawn from sale pursuant to Section 11713(c) Vehicle Code. Appellant argues that respondent's "...evidence consisted entirely of merely showing that the ads had been published 48 hours after the car was sold."

Section 11713(c) Vehicle Code provides that it is unlawful and a violation of the Vehicle Code for a dealer "To fail within 48 hours in writing to withdraw any advertisement of a vehicle that has been sold or withdrawn from sale." Appellant calls our attention to some colloquy during the administrative proceedings concerning the proper interpretation of that section and suggests the statute has caused much confusion. The question was raised as to whether the statute imposes a duty upon the dealer to have the advertisement withdrawn from publication within 48 hours after the vehicle advertised is sold or withdrawn from sale or whether it merely imposes upon the dealer a duty to notify the publisher via a writing within the 48-hour period that the advertisement is to be canceled. Appellant contends that the latter interpretation is correct. We concur with this interpretation of appellant, but it is clear that the respondent, both in the administrative proceedings and before this board, also interpreted the statute in that manner. There is no contention made by respondent that a dealer should be subject to disciplinary action if a publisher fails to respond in time to his cancellation order. Had respondent taken the position that statute requires a dealer to have the ad withdrawn from publication within the 48-hour period, respondent would

merely have sought to prove the date the vehicle was sold or withdrawn from sale and the date the vehicle was last advertised. Respondent, however, went beyond this and proved that the records of the Oakland Tribune did not contain any indication that appellant had submitted a writing to the newspaper directing that the ads in question be canceled.

One could not seriously contend that the Legislature intended that a dealer be held responsible for the acts or omissions of a newspaper publisher over which the dealer has no control. The issue before us is not whether the publisher did or did not respond to appellant's cancellation order, but whether appellant did or did not submit such order timely and in the written form.

Testimony from appellant's witnesses supports the finding that appellant failed to follow the mandate of Section 11713(c) Vehicle Code. The advertisements of the vehicles described as Items 2, 3, 4 and 8 in Exhibit A were published in one or more newspapers during the first half of July 1968. Appellant's sales manager testified under cross-examination that advertisements placed by appellant were "probably" being canceled only by telephone calls in July 1968 (Vol. 2, R.T. 14, lines 5-7). While there was testimony produced by appellant that it commenced using a system wherein postcards were used to cancel ads,

appellant's sales manager testified that this procedure commenced approximately 10 months prior to the administrative hearing, which made the inauguration of the use of postcards well after the publication of the ads in question (Vol. 2, R.T. 14, lines 8-9).

Furthermore, another witness called by appellant, a classified advertising salesman for the Contra Costa Times during 1968 and 1969, testified under cross-examination that he started receiving written cancellations of advertisements from appellant shortly after receiving a copy of a letter from the Department of Motor Vehicles addressed to dealers; this letter was received sometime in August of 1968 (Vol. 2, R.T. 34, lines 14-26).

The evidence clearly supports the finding that appellant failed to cancel advertisements placed by appellant for those vehicles described as Items 2, 3, 4 and 8 of Exhibit A in writing within the time specified in Section 11713(c) Vehicle Code.

Respondent found that appellant committed acts in violation of Section 11713(a) Vehicle Code in July 1968 by publishing in two newspapers advertisements of automobiles that were misleading and inaccurate in material particulars, namely that the buyer could "assume" a monthly payment, following payment of a "handling fee" which falsely led members of the public to believe they could receive the

benefits of existing loans on the vehicles. For example, a portion of an advertisement offering a 1960 Thunderbird for sale included the language, "Pay $28 and assume $38 per month." Appellant attacks this finding by contending that: (1) Respondent did not meet its burden of proof in that it did not show that appellant's advertising was misleading in material particulars and (2) respondent did not present evidence that there are benefits in an existing loan, or at least that prospective customers were informed or thought there were benefits to be received from an existing loan.

Section 11713(a) Vehicle Code does not in any way define "material particulars" and, at the time the advertisements in question were published, respondent had not defined the term through its regulatory powers. However, in a contract for sale of an automobile, it is obvious that the method of financing the purchase price is a "material particular". It is common knowledge that automobiles are frequently purchased on a deferred payment plan and that the buyer frequently looks to the seller for assistance in arranging for the deferred financing when the vehicle is purchased from an automobile dealer. The amount of the down payment and the amount and number of monthly payments is as important to the buyer who cannot pay cash for a vehicle as the make, condition and price of the vehicle.

There is no burden upon respondent to prove any benefits inure to a buyer who assumes an existing loan. The question is whether reference in an advertisement to the payment of a handling fee and assuming a monthly payment would lead the reader of the advertisement to believe that he would be benefited by such an arrangement. This question is well answered by the following excerpt from Respondent's Reply Brief:

> "Clearly, the words 'assume a monthly payment', when used in connection with an offer to sell a used car, reasonably conveys the idea that there has already been some previous monthly payment made toward the balance of the purchase price. ...this is clearly a 'benefit' of an existing loan. And appellant's ads further enhanced the idea of 'benefit' from an existing loan by specifying a small amount for a 'handling fee'. Here the obvious implication is that the down-payment had already been satisfied in connection with the existing loan, and all that was required was a minimal fee for administrative cost. Thus, whether or not in any given case there actually is a 'benefit' involved in an existing loan, the ads in question certainly conveyed the idea that a benefit was available in the form of some payment already made by a prior owner."

Respondent proved publication of the advertisements containing the objectionable language and the fact that none of the vehicles so advertised had existing loans which could be assumed. These were the elements regarding this aspect of its case necessary for respondent to prove. Although respondent elected to go further and proved that some readers of the advertisements were misled as to the

terms of financing of the automobile, doing so was unnecessary in view of the language in Webster vs. Board of Dental Examiners, 17 Cal.2nd 534, 541, that:

> "...the evils of deceptive advertising cannot be reached effectively if legislation to that end is interpreted to require proof of actual reliance upon a false statement knowingly made, as in a common law action in deceit."

We find that the evidence produced by respondent was sufficient to support Finding VIII of the Decision of the Director of Motor Vehicles.

II. IS THE PENALTY IMPOSED BY THE DIRECTOR OF MOTOR VEHICLES COMMENSURATE WITH HIS FINDINGS?

Appellant argues that the penalty imposed is much too harsh even though this board holds that the findings of respondent are supported by the evidence. Appellant contends that some of the violations are of a technical or of a de minimus nature and that one was based upon an ambiguous statute. Appellant further argues that the violations concerning the advertising of vehicles in such a way that one would be led to believe that the vehicle could be purchased under an existing loan "...appears to be the only type of violation involved that the revocation penalties could possibly apply."

The evidence concerning the employment of the unlicensed salesman indicated that appellant held little or no respect for the requirements of the law; the unlawful employment was continued by appellant even after the July 28, 1969, Accusation and until only two or three weeks before the administrative

hearing on November 20, 1969. This board was not favorably impressed with appellant's contention that it was unaware that the salesman was unlicensed. Appellant was charged with the duty of determining that he was licensed when it employed him. The reason for the revocation of the salesman's license was entirely immaterial and in no manner excused appellant from continuing the unlawful employment, particularly during the period after being charged with the violation by the Department's Accusation.

Although we do not dismiss the remaining violations as being insignificant, we are of the opinion that the false and misleading advertising violations are of serious consequence.

The evidence clearly shows that appellant put into operation and maintained a scheme designed to mislead the public, and caused advertisements of a false and misleading nature to be published in newspapers. The ads referred the reader to a named person and gave a telephone number different from the telephone number listed in appellant's other advertisements. The advertisements did not disclose appellant's name. The phone number was that of an answering service. Appellant's agent returned the calls and, in several instances, informed the prospective buyers responding to the ads that the vehicles had been repossessed (Volume 1, R.T. 20, 24, 26, 33 and 49). This was a deliberate falsehood; the

vehicles had not been repossessed. This was established not only by respondent's direct evidence but also by the testimony of appellant's finance manager (Vol. 2, R.T. 38, lines 19-24).

We are unimpressed with appellant's arguments that respondent should have informed appellant that its advertisements were objectionable. There are situations wherein reasonable men may differ as to whether or not certain advertisements are of a false or misleading nature. When such opportunity for confusion exists, perhaps a warning or other clarifying device should be provided by the enforcing agency prior to proceeding with disciplinary action. However, on the facts in this case, no reasonable man could harbor any doubt as to whether the ads would or would not convey to the public a false message. A warning in this case was not indicated.

We do not find the penalty imposed by respondent too severe. It gives appellant the opportunity to continue in the business of selling automobiles, providing appellant abides by the laws governing the conduct of such business. Appellant purports to have a sincere desire to follow the law and regulations of the Department of Motor Vehicles with reference to advertising vehicles. The two-year probationary period imposed in this case will give appellant

adequate opportunity to demonstrate its ability and desire to do so.

With respect to Items 1 and 7 of Exhibit A, attached to the Accusation, and by reference made a part of Finding III of the Decision of the Director of Motor Vehicles, the Decision is reversed. In all other respects, the Decision is affirmed.

# # #

WARREN BIGGS, President

ROBERT B. KUTZ

GILBERT D. ASHCOM

PASCAL B. DILDAY

MELECIO H. JACABAN

MRS. AUDREY B. JONES, Vice President

ROBERT B. NESEN

adequate opportunity to demonstrate its ability and desire to do so.

With respect to Items 1 and 7 of Exhibit A, attached to the Accusation, and by reference made a part of Finding III of the Decision of the Director of Motor Vehicles, the Decision is reversed. In all other respects, the Decision is affirmed.

# # #

WARREN BIGGS, President

ROBERT B. KUTZ

Gilbert D. Ashcom

GILBERT D. ASHCOM

PASCAL B. DILDAY

MELECIO H. JACABAN

MRS. AUDREY B. JONES, Vice President

ROBERT B. NESEN

adequate opportunity to demonstrate its ability and desire to do so.

With respect to Items 1 and 7 of Exhibit A, attached to the Accusation, and by reference made a part of Finding III of the Decision of the Director of Motor Vehicles, the Decision is reversed. In all other respects, the Decision is affirmed.

# # #

WARREN BIGGS, President

ROBERT B. KUTZ

GILBERT D. ASHCOM

PASCAL B. DILDAY

MELECIO H. JACABAN

MRS. AUDREY B. JONES, Vice President

ROBERT B. NESEN

adequate opportunity to demonstrate its ability and desire to do so.

With respect to Items 1 and 7 of Exhibit A, attached to the Accusation, and by reference made a part of Finding III of the Decision of the Director of Motor Vehicles, the Decision is reversed. In all other respects, the Decision is affirmed.

# # #

WARREN BIGGS, President

ROBERT B. KUTZ

GILBERT D. ASHCOM

PASCAL B. DILDAY

MELECIO H. JACABAN

MRS. AUDREY B. JONES, Vice President

ROBERT B. NESEN

adequate opportunity to demonstrate its ability and desire to do so.

With respect to Items 1 and 7 of Exhibit A, attached to the Accusation, and by reference made a part of Finding III of the Decision of the Director of Motor Vehicles, the Decision is reversed. In all other respects, the Decision is affirmed.

# # #

WARREN BIGGS, President

ROBERT B. KUTZ

GILBERT D. ASHCOM

PASCAL B. DILDAY

MELECIO H. JACABAN

MRS. AUDREY B. JONES, Vice President

ROBERT B. NESEN

adequate opportunity to demonstrate its ability and desire to do so.

With respect to Items 1 and 7 of Exhibit A, attached to the Accusation, and by reference made a part of Finding III of the Decision of the Director of Motor Vehicles, the Decision is reversed. In all other respects, the Decision is affirmed.

# # #

WARREN BIGGS, President

ROBERT B. KUTZ

GILBERT D. ASHCOM

PASCAL B. DILDAY

MELECIO H. JACABAN

MRS. AUDREY B. JONES, Vice President

ROBERT B. NESEN

adequate opportunity to demonstrate its ability and desire to do so.

With respect to Items 1 and 7 of Exhibit A, attached to the Accusation, and by reference made a part of Finding III of the Decision of the Director of Motor Vehicles, the Decision is reversed. In all other respects, the Decision is affirmed.

# # #

WARREN BIGGS, President

ROBERT B. KUTZ

GILBERT D. ASHCOM

PASCAL B. DILDAY

MELECIO H. JACABAN

MRS. AUDREY B. JONES, Vice President

ROBERT B. NESEN

adequate opportunity to demonstrate its ability and desire to do so.

With respect to Items 1 and 7 of Exhibit A, attached to the Accusation, and by reference made a part of Finding III of the Decision of the Director of Motor Vehicles, the Decision is reversed. In all other respects, the Decision is affirmed.

# # #

WARREN BIGGS, President

ROBERT B. KUTZ

GILBERT D. ASHCOM

PASCAL B. DILDAY

MELECIO H. JACABAN

Audrey B Jones

MRS. AUDREY B. JONES, Vice President

ROBERT B. NESEN

STATE OF CALIFORNIA

NEW CAR DEALERS POLICY & APPEALS BOARD

In the Matter of	)	
	)	
MIDWAY FORD SALES, a California corporation,	)	
	)	
Appellant,	)	Case No. A-11-70
	)	
vs.	)	Filed:
	)	
DEPARTMENT OF MOTOR VEHICLES,	)	January 12, 1971
	)	
Respondent.	)	
	)	

Time and Place of Hearing:	December 9, 1970, 2:00 p.m. 2415 First Avenue Sacramento, CA 95818
For Appellant:	Getz, Aikens & Manning By: George E. Leaver Attorney at Law 6435 Wilshire Boulevard Los Angeles, CA 90048
For Respondent:	Honorable Thomas Lynch Attorney General By: Mark Leicester Deputy Attorney General

FINAL ORDER

In the Decision ordered May 28, 1970, by the Director of Motor Vehicles, pursuant to Chapter 5, Part 1, Division 3, Title 2, Government Code, it was found that appellant: (1) Failed in 84 instances to file with respondent written notices of

the transfer of interest in certain motor vehicles before the end of the third business day after transferring the vehicles; (2) wrongfully and unlawfully failed in 50 instances to mail or deliver to respondent the report of sale of used vehicles together with such other documents and fees required to transfer the registration of the vehicles within the 20-day period allowed by law; (3) wrongfully and unlawfully failed in 46 instances to mail or deliver to respondent the application for registration of new motor vehicles together with other documents and fees required to register the vehicle within the 10-day period allowed by law; (4) reported to respondent in 6 instances a date of sale other than the true date of sale of certain vehicles and thereby made false statements or concealed material facts in the application for registration of the vehicles; (5) reported to respondent a date other than the true date for the first date of operation of certain vehicles, thereby making false statements or concealing material facts in the application for registration of the vehicle; (6) in 18 instances, included as an added cost to the selling price of vehicles, registration fees in excess of the fees due and payable to the State; (7) in two instances, employed as a vehicle salesman one not licensed as a vehicle salesman.

It was further found that: (1) The variances between the true dates of sale and the reported dates of sale were minimal, generally two to four days; (2) the general practice of the appellant in selling vehicles and writing reports of sale was to write a purchase order and take a deposit from the customer, after which physical delivery of the vehicle was made in several days, and the report of sale was written on and as of the date of physical delivery; (3) all overcharges for registration fees were refunded by appellant and appellant has taken corrective action to reduce the possibility of registration fee overcharges.

The original penalty imposed by respondent suspended appellant's license, certificate and special plates for a period of 30 days. Upon reconsideration, the Director of Motor Vehicles modified the penalty by staying the execution of 20 days of the order of suspension. Appellant was placed on probation for a period of two years under the condition that it strictly comply with all laws of the United States, the State of California and the political subdivisions thereof and the rules and regulations of the Department of Motor Vehicles and should the Director of Motor Vehicles determine that appellant violated its probation, he was given the power to terminate the stay and impose the suspension or otherwise modify his order. In the event appellant faithfully

kept the terms and conditions imposed for the period of two years, the stay was to have become permanent and appellant was to have been restored to all of its license privileges.

An appeal was filed with this board pursuant to Chapter 5, Division 2 of the Vehicle Code, alleging that: (1) Finding IX of the Director of Motor Vehicles that appellant employed two persons as vehicle salesmen who were not licensed as such is not supported by the evidence; and (2) that part of the penalty imposing an actual 10-day suspension is too harsh and severe. Appellant asks that we reverse Finding IX and also order a stay of the entire suspension.

I. DID APPELLANT EMPLOY PERSONS AS SALESMEN WHO WERE NOT LICENSED AS SALESMEN PURSUANT TO THE VEHICLE CODE?

Finding IX of the Director of Motor Vehicles recites:

> "Respondent employed the services of Joe Abrego and Janice Fortune to present prospective customers, one each, at the premises of appellant upon the promise that if sales were made to such prospects, a sum of money would be paid by the appellant to said Abrego and Fortune. Each said individual presented one prospective customer and a motor vehicle was sold to each of the prospects. Appellant paid the sum of $35 to Abrego for his services and the sum of $50 to Fortune for her services. Neither Abrego or Fortune participated in negotiating the prospective sales in any way beyond the mere introduction of the sales prospects to an agent of the appellant. Neither Abrego or Fortune were licensed as a vehicle salesman, pursuant to the provisions of the Vehicle Code of California (commencing with Section 11800), nor was a license for each of them displayed on the premises of appellant."

Appellant contends that it did not "employ" either Abrego or Fortune as a salesman and cites Val Strough Chevrolet vs. Bright, 269 Cal.App.2nd 855, as authority for this contention. Appellant argues that Val Strough holds that the word "employ", as used in Section 11713(h) vehicle Code (formerly 11713(i)), must be interpreted in the traditional sense; i. e., the usual attributes of an employer-employee relationship must exist. The record does not reveal that the employer-employee relationship existed in the traditional sense. If appellant's contention is correct, respondent's finding that appellant employed Abrego and Fortune is not supported by the evidence. One question before us, therefore, is whether or not the Legislature has given a broader meaning to the word "employ" in regard to the provisions of the Vehicle Code pertinent to the issue before us. The other question concerns the ruling of the court in Val Strough.

Appellant's interpretation of Val Strough is erroneous. The Val Strough case involved an appeal by the Director of Motor Vehicles from a judgment of the superior court directing him to set aside an order suspending the dealer license of Val Strough Chevrolet Co. Val Strough had employed a licensed automobile salesman named Thompson. A.G.E., a discount house which transacted business in the area, offered a financing plan for purchasers of new cars and, in order to increase its finance business, the discount house advertised that it could

arrange for its customers to buy any make of new automobile of the customer's choice at a favorable price when financing of the purchase price was arranged through the discount house by the customer. Whenever the discount house had a customer who wished to purchase a Chevrolet, the discount house referred the customer to Val Strough's salesman, Thompson, at Val Strough's place of business. If the customer purchased a car from Val Strough, the salesman, Thompson, paid the discount house $50.00 from his own funds. Val Strough knew of the practice and had obtained legal advice with respect to it. Val Strough had a custom of paying for "creative business" obtained by its salesmen. "Creative business" was defined as business from a person who had not previously purchased a car from Val Strough and who did not come to Val Strough as a result of its regular advertising or established reputation. The discount house's referral of customers to Thompson was treated as "creative business" which resulted in Val Strough paying Thompson $25.00 over his regular commission for each car sold in that fashion. Although Val Strough knew of Thompson's practice with respect to paying the discount house, there was no agreement or arrangement between Val Strough and the discount house, other than Thompson's arrangement. Val Strough did nothing to discourage this arrangement.

In the administrative proceedings, the Department had found that the discount house was an unlicensed salesman,

as defined in Section 675 Vehicle Code, and that Val Strough had employed the discount house within the meaning of Section 11713(i) (now Section 11713(h)) Vehicle Code. The superior court reversed the Department, holding that that finding was not supported by the evidence.

The appellate court sustained the trial court, observing that the trial judge properly exercised his power to evaluate all of the evidence in the record and to draw therefrom whatever inferences he deemed proper. The appellate court found that there was substantial evidence to support the finding of the trial court. So long as the inferences drawn were reasonable and supported by the record, the appellate court concluded that it must affirm the trial court's judgment. Accordingly, the appellate court found that, although the evidence was reasonably susceptible to different inferences, it must sustain the inferences drawn by the trial court, even though the trial court had reached an opposite conclusion from the one arrived at by the Department. In this regard, it observed, at page 861:

> "The record reflects none of the usual attributes of an employer-employee relationship. There was no agreement or understanding between respondent and A.G.E. as to any services to be rendered or compensation to be paid. Likewise, there is not the slightest evidence that Val Strough exercised any control, or had the right to control, the conduct and activities of A.G.E. The strong emphasis of A.G.E.'s display advertising was upon the favorable financing it could arrange for new car buyers. There was no suggestion in any of the

> advertising that any particular make of car be purchased. When a customer made inquiry of A.G.E. in response to its advertising concerning financing, if the customer was interested in a Chevrolet automobile, he was referred to Lon Thompson, respondent's salesman. Thereafter all of the negotiations concerning the purchase of the vehicle took place at respondent's place of business and A.G.E. came back into the picture only after the sale had been arranged between respondent and the customer, and then only with respect to financing the customer's purchase. A.G.E. had no cars for sale on its premises, nor did it take part in any of the negotiations looking toward the sale or purchase of new cars. This evidence, therefore, supports the inference that A.G.E. was not acting for respondent and was not employed by the respondent as a vehicle salesman within the meaning of Section 675, Subdivision (a)(1) of the Vehicle Code."

The court further observed that, although the language of Section 675(a)(2), Vehicle Code, is broad, the evidence did not establish that, as a matter of law, A.G.E.'s conduct fell within the scope of the statute. The appellate court, however, recognized that there was other evidence from which a contrary conclusion could have been reached, particularly the evidence which showed that the discount house had received compensation from Thompson for its referrals and that the trial court could have inferred therefrom that the discount house's advertising was a device to induce the sale of new cars. The court concluded that that inference was not compelled, however, and the contrary inference drawn by the trial court was reasonable and supported by the record.

In our view, the Val Strough decision does not preclude a finding on the record before us that appellant employed

Abrego and Fortune as salesmen. In Val Strough, the court did not hold that all of the usual attributes of the employer-employee relationship must exist to support that finding. On the contrary, the court in Val Strough not only recognized that the Legislature had given a broad meaning to the word "employ", but also that on the facts of Val Strough, the evidence did support the finding by the Department that the requisite employment existed.

In the case before us, appellant not only knew of the arrangement between its licensed salesmen and the referring parties, Abrego and Fortune, but it ratified the acts of the licensed salesmen by paying the fees directly to Abrego and Fortune. These facts, in our opinion, support the inference that appellant's licensed salesmen made the agreements with Abrego and Fortune on behalf of appellant and that Abrego and Fortune were acting for appellant when they referred prospective customers to the dealership rather than, as in Val Strough, acting only for a licensed salesman in the pursuit of his customer-developing activities.

This board takes notice of the records of the Department of Motor Vehicles showing that the acts giving rise to the finding that Val Strough Chevrolet Company hired an unlicensed salesman occurred during May 1964. Subsequent thereto, Section 11806(g) Vehicle Code (Stats. 1967, Ch. 1038), the predecessor to Section 11806(f) Vehicle Code, was enacted by the Legislature,

which provides that it is unlawful, and a cause for administrative disciplinary action against a licensed vehicle salesman, for a licensed salesman to enter into any agreement to pay a commission or fee to any person not licensed as a vehicle salesman. The enactment of this statute is further evidence of the Legislature's intent to preclude the participation of unlicensed persons in the business of selling cars for a commission or other remuneration. It would be anomalous to hold that it is unlawful for a licensed salesman to agree to compensate an unlicensed person for the referral of a prospective automobile buyer and, on the other hand, hold that it is lawful for a dealer to encourage, condone and ratify such unlawful acts of his salesmen. To accept the construction of the law urged upon us by appellant would sanction dealer conduct which aids and abets wrongful acts of his employees. Certainly the Legislature never intended such a result.

It was stipulated at the administrative hearing that Abrego and Fortune were not licensed as vehicle salesmen and appellant conceded during the hearing before this board that their acts brought them within the definition of a vehicle salesman (Section 675 Vehicle Code).

We hold that where, as here, a dealer has knowledge of an agreement between his salesman and an unlicensed person for the performance of any act which would bring such person within the meaning of Section 675 Vehicle Code, and the dealer

participates in the fulfillment of the agreement by compensating the unlicensed person for performing, he is subject to disciplinary action for violation of Section 11713(h) Vehicle Code. Accordingly, we affirm Finding IX of the Decision of the Director of Motor Vehicles.

II. IS THE PENALTY IMPOSED BY THE DIRECTOR OF MOTOR VEHICLES TOO HARSH AND SEVERE?

In previous cases we have reviewed the penalty-determining powers of this board and concluded that we may, without finding an abuse of discretion on the part of the respondent, find the penalty imposed is excessive, exercise our independent judgment and amend the penalty accordingly (Bill Ellis, Inc., vs. Department of Motor Vehicles, A-2-69; Fletcher Chevrolet, Inc., vs. Department of Motor Vehicles, A-4-69; Mission Pontiac Co. vs. Department of Motor Vehicles, A-6-70).

The primary purpose of proceedings to discipline new car dealer licensees is to protect the general public from wrongful acts of the licensee. There are, of course, circumstances under which this goal can be accomplished only by a revocation or suspension of the license. An actual suspension of the license may be necessary to impress upon the licensee that conduct inimical to the welfare of the general public and the regulated business will not be tolerated by the enforcing agency.

The penalty imposed upon appellant by the Director calls for actual suspension of its authority to sell automobiles for a period of ten days. Such an interruption of business might well force appellant to permanently close its doors. Even though the appellant might survive being closed for ten days, the economic consequences to appellant and its employees would be drastic. This is particularly true in the current economic climate.

We do not minimize the seriousness of the wrongful acts of appellant, nor do we in any way condone the intentional or negligent operation of an automobile dealership in such a way that violations occur such as those before us here. On the contrary, we wish to stress that automobile dealers must abide by all such laws and regulations in the conduct of their business. A dealer owes a solemn duty to the public to supervise the operation of his dealership in a manner calculated to insure compliance with all applicable laws and to achieve and maintain a high standard of business ethics. Appellant obviously has not discharged this duty. However, the Director of Motor Vehicles has found that appellant has taken steps to correct its wrongful practices. We believe that the public welfare will be adequately served if the opportunity to place its dealership in proper working order without an immediate suspension of its business activities is given appellant. Therefore, we shall modify the order by

providing for a stay of the license suspension during a substantial period of probation. In the event appellant is unable to develop and maintain business practices which strictly comply with the law, the Director of Motor Vehicles shall have the authority to suspend appellant's privilege of selling motor vehicles for 30 days, or a portion thereof.

WHEREFORE THE FOLLOWING ORDER IS HEREBY MADE:

The dealer's license, certificate and special plates of appellant, Midway Ford Sales, a California corporation, is hereby suspended for a period of thirty days; provided, the execution of said thirty-day suspension is hereby stayed and appellant is placed on probation for a period of two years under the following terms and conditions:

1. Appellant shall strictly comply with all of the provisions of the Vehicle Code and the regulations of the Department of Motor Vehicles governing dealers of motor vehicles in the State of California.
2. Appellant shall obey all laws of the United States, of the State of California, and the political subdivisions thereof and the rules and regulations of the Department of Motor Vehicles.
3. If, and in the event, the Director of Motor Vehicles should determine that a violation of probation has

occurred, the Director may terminate the stay and impose a suspension or otherwise modify the order

In the event appellant faithfully keeps the terms of the conditions imposed for a period of two years, the stay shall become permanent and appellant shall be restored to all of its licensed privileges.

This Final Order shall become effective January 29, 1971.

# # #

WARREN BIGGS, President

ROBERT B. KUTZ

GILBERT D. ASHCOM

PASCAL B. DILDAY

RALPH L. INGLIS

MELECIO H. JACABAN

ROBERT D. NESEN

WINFIELD J. TUTTLE

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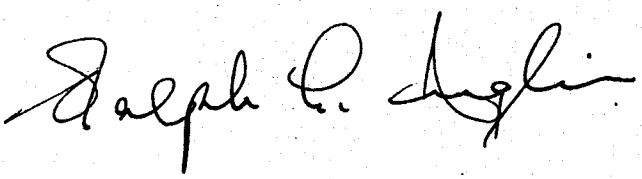
RALPH L. INGLIS 

MELECIO H. JACABAN

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ROBERT D. NESEN

WINFIELD J. TUTTLE

COFFIN & LIEDSTRAND
ATTORNEYS AT LAW
135 SOUTH CENTER STREET
P. O. BOX 1623
TURLOCK, CALIFORNIA 95380

ROBERT R. COFFIN, JR.
BRUCE W. LIEDSTRAND

TELEPHONE
634-5855

January 16, 1971

New Car Dealers Policy and Appeals Board
P. O. Box 1828
Sacramento, California 95809

RE: BIG VALLEY DODGE, INC. V. DEPT OF MOTOR VEHICLES
Appeal No. A-12-70

Gentlemen:

Big Valley Dodge, Inc. has decided not to proceed further with the above appeal, and the appeal is therefore withdrawn and dismissed.

Yours very truly,

COFFIN & LIEDSTRAND

By: Bruce W. Liedstrand

BIG VALLEY DODGE, Inc.

By: Bruce W. Liedstrand

cc: Mr. Frank J. Watson
DMV

STATE OF CALIFORNIA

NEW CAR DEALERS POLICY & APPEALS BOARD

In the Matter of DANA CHEVROLET, INC., A California Corporation, Appellant, vs. DEPARTMENT OF MOTOR VEHICLES, Respondent.	)	Case No. A-13-71 Filed: May 17, 1971

Time and Place of Hearing:	April 14, 1971, 10:30 a.m. City Council Chambers 3300 Newport Boulevard Newport Beach, California
For Appellant:	Deryl D. Shumway Attorney at Law 10243 Paramount Boulevard Downey, California 90241
For Respondent:	Honorable Evelle Younger Attorney General By: Mark Leicester Deputy Attorney General

FINAL ORDER

In the Decision ordered December 7, 1970, by the Director of Motor Vehicles, pursuant to Chapter 5, Part 1, Division 3, Title 2 of the Government Code, it was found that appellant: (1) Failed in 79 instances to give respondent written notice of the transfer of the interest in certain vehicles as required

by Section 5901 Vehicle Code; (2) wrongfully and unlawfully failed in 116 instances to mail or deliver to respondent the report of sale of used vehicles together with such other documents and fees required to transfer registration of the vehicles within the 20-day period allowed by law; (3) wrongfully and unlawfully failed in 69 instances to mail or deliver to respondent the reports of sale of new vehicles together with such other documents and fees required to register the vehicles within the 10-day period allowed by law; (4) reported to respondent in one instance a date of sale other than the true date of sale of a certain vehicle; (5) filed with respondent in 5 instances a false certificate of non-operation of certain vehicles; (6) reported to respondent in one instance a date other than the true date for the first date of operation of a certain vehicle; (7) in 4 instances, included as an added cost to the selling price of certain vehicles, registration fees in excess of the fees due and payable to the State; and (8) failed in one instance to affix the operating copy of the report of sale and the paper license plate to a certain vehicle.

The Decision of the Director of Motor Vehicles revoked the license, certificate and special plates of appellant. The revocation was stayed and appellant placed on probation for a period of one year. Terms and conditions of probation are:

(1) Appellant's license, certificate and special plates shall be suspended for a period of 5 days; and

(2) Appellant shall comply with all laws of the United States, the State of California, its political subdivisions and with all the rules and regulations of the Department of Motor Vehicles.

An appeal was timely filed with this board pursuant to Chapter 5, Division 2 of the Vehicle Code.

At the administrative hearing, appellant did not attempt to controvert the evidence introduced by respondent. Further, there was no serious contention made before this board, either orally or via briefs, that the evidence produced by respondent was insufficient to support the findings of the Director of Motor Vehicles. Thus, the only issue before this board concerns the appropriateness of the penalty imposed by the Director of Motor Vehicles.

I. IS THE PENALTY IMPOSED BY THE DIRECTOR OF MOTOR VEHICLES COMMENSURATE WITH HIS FINDINGS?

Appellant's president, Paul Dombroski, contended at the administrative hearing and appellant contended on appeal that the acts charged in the Accusation occurred because of the incompetence or intentional misdeeds of one Warren Gardner, a State parolee. At the urging of Gardner's parole agent, Gardner was employed by appellant and placed in charge of matters involving the Department of Motor Vehicles. The parole agent informed Mr. Dombroski that Gardner had been

incarcerated for wrongful acts regarding two automobile dealers but had made complete restitution. The agent believed that Gardner should be given another opportunity.

The incompetency or intentional misconduct of Gardner may explain violations of the law on the part of appellant but Gardner's acts or omissions do not excuse such violations; neither can they in any way mitigate the penalty. Appellant is responsible for the acts or omissions of its officers and employees.

In our view, a prudent businessman, knowing that one of his employees was a paroled prisoner who had been incarcerated for criminal conduct involving other automobile dealers, would exercise a higher degree of supervision over that employee than over those employees not demonstrating a proclivity for criminal behavior.

Appellant failed in 264 instances to timely file required documents with respondent, furnished respondent with false information on 7 occasions, overcharged purchasers of automobiles for vehicle license fees in 4 instances and failed in one instance to properly affix certain documents to a vehicle it sold. According to testimony of Mr. Dombroski, appellant had received a warning letter from the Department of Motor Vehicles during March 1969. The letter was for the purpose of alerting appellant to the fact that it was

committing violations of certain laws. These violations were of the same nature as those charged in the Accusation and found by respondent to be true. Mr. Dombroski testified that he took corrective action, after receiving the letter, by replacing Warren Gardner. This action took place, according to Mr. Dombroski, about 90 days after receiving the letter which would have been sometime during June 1969. But, a review of the exhibits attached to the Accusation shows that a substantial portion of the violations occurred subsequent to June of 1969. The conclusion is inescapable that replacing Gardner was not the only corrective action required.

The record before us demonstrates that appellant elected to view the laws governing an automobile dealer in a casual and indifferent manner. Appellant followed a course of wrongful conduct which shows a disregard of its responsibilities to customers, the rights of the public at large, and the orderly discharge of the appellant's duties regarding vehicle registration. A license to sell automobiles imposes both burdens and benefits upon the licensee. This licensee has sought to reap the benefits but has demonstrated a lack of proper concern towards meeting the burdens. Appellant was content to place a vital part of its business operation in the hands of one with a background requiring a high degree of supervision; appellant failed to exercise such a degree of

supervision. The record demonstrates that the corrective measure was not, in fact, corrective.

We said in Midway Ford Sales vs. Department of Motor Vehicles (A-11-70):

> "The primary purpose of proceedings to discipline new car dealer licensees is to protect the general public from wrongful acts of the licensee. There are, of course, circumstances under which this goal can be accomplished only by a revocation or suspension of the license. An actual suspension of the license may be necessary to impress upon the licensee that conduct inimical to the welfare of the general public in the regulated business will not be tolerated by the enforcing agency."

We have exercised our independent judgment upon the record before us and have concluded that a cessation of appellant's privilege of selling automobiles for a period of time is required to impress upon appellant that the laws regulating automobile dealers must be obeyed. Appellant was given fair warning but chose not to heed it.

The Decision of the Director of Motor Vehicles is affirmed in its entirety.

This Final Order shall become effective June 1, 1971.

AUDREY B. JONES	GILBERT D. ASHCOM
PASCAL B. DILDAY	RALPH L. INGLIS
MELECIO H. JACABAN	ROBERT D. NESEN
ROBERT A. SMITH	WINFIELD J. TUTTLE

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Audrey B. Jones
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ROBERT A. SMITH	WINFIELD J. TUTTLE

STATE OF CALIFORNIA

NEW CAR DEALERS POLICY & APPEALS BOARD

RALPH VAN ASPEREN, dba PARADISE MOTOR SALES, Appellant, vs. DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF CALIFORNIA, Respondent.	)	Case No. A-14-71 Filed: 16 August 1971

Time and Place of Hearing: August 11, 1971, 2:45 p.m.
City Council Chambers
City Hall
1685 Main Street
Santa Monica, California

For Appellant: Ralph Van Asperen,
In propria persona
475 Pearson Road
Paradise, California

For Respondent: Leo V. Bingham
Associate Counsel
Department of Motor Vehicles
2415 First Avenue
Sacramento, California

FINAL ORDER

Ralph Van Asperen, dba Paradise Motor Sales, filed with the New Car Dealers Policy and Appeals Board on July 2, 1971, a notice of appeal from the decisions of the Director of Motor Vehicles in Case No. RD-60 and Case No. D-1113 entitled respectively, "In the Matter of the Statement of Issues Against Ralph Van Asperen, dba Paradise Motor Sales, Respondent" and "In the Matter of the

Accusation of Ralph Van Asperen, dba Paradise Motor Sales, Respondent". Appellant asserted on appeal that: (1) the decision of the Director of Motor Vehicles was not supported by the findings and (2) the penalty as provided in the decision was not commensurate with the findings.

The cases came on regularly for hearing before the New Car Dealers Policy and Appeals Board on the 11th day of August 1971 in the County of Los Angeles, California. Having read all papers on file in these cases; the matter having been orally argued by the parties; and, having been fully informed in the matter, the Board made the following final order:

The decisions of the Director of Motor Vehicles in Case No. RD-60 and Case No. D-1113 are affirmed.

Harry Towne

HARRY TOWNE
Executive Secretary
NEW CAR DEALERS POLICY & APPEALS BOARD

DATE August 16, 1971

ABOVE DECISION REACHED AUGUST 11, 1971:

Gilbert D. Ashcom
GILBERT D. ASHCOM

Robert B. Kutz
ROBERT B. KUTZ

Pascal B. Dilday
PASCAL B. DILDAY

Melecio H. Jacaban
MELECIO H. JACABAN

Robert D. Nesen
ROBERT D. NESEN

Robert A. Smith
ROBERT A. SMITH

Winfield J. Tuttle
WINFIELD J. TUTTLE

NEW CAR DEALERS POLICY AND APPEALS BOARD

STATE OF CALIFORNIA

RICH MOTOR COMPANY, a California Corporation, Appellant,	)	Case No. A-16-71
v.	)	Filed: May 2, 1972
DEPARTMENT OF MOTOR VEHICLES, Respondent.	)	

Time and Place of Hearing:	April 12, 1972, 11:15 a.m. Director's Conference Room Department of Motor Vehicles 2415 First Avenue Sacramento, California
For Appellant:	Edward McCutchen Mannon Attorney at Law 155 Montgomery Street San Francisco, CA 94104
For Respondent:	Honorable Evelle J. Younger Attorney General By: Victor D. Sonenberg Deputy Attorney General

FINAL ORDER

On July 12, 1971, the Department of Motor Vehicles, hereinafter referred to as "respondent", filed an accusation pursuant to Chapter 5, Part 1, Division 3, Title 2, of the Government Code, against Rich Motor Company, hereinafter referred to as "appellant", charging that appellant:

1. Issued seven checks to respondent for obligations or fees due the State which checks were dishonored by the bank upon which drawn, and
2. Disconnected, turned back or reset odometers on three automobiles.

The checks were issued from November 6, 1969, to March 8, 1971, inclusive, and ranged in amounts of $297.00 to $17.00, for a total of $1,079.00.

The mileage on the odometers was reduced approximately 30,000 miles on one vehicle, 26,000 miles on a second and 30,500 miles on a third.

The matter was heard by an officer of the Office of Administrative Hearings on September 27, 1971, and a proposed decision issued on September 28, 1971. The hearing officer found the charges as set forth in the accusation to be true and, pursuant to such findings, proposed that appellant's license, certificate and special plates be suspended for a period of sixty days with forty-five days thereof stayed for a one year probationary period. During the first fifteen days of probation, appellant is required to refrain from conducting any business as an automobile dealer and, for the remainder thereof, is to comply fully with all laws, rules and regulations pertaining to licensed automobile dealers.

The hearing officer further found that appellant had paid the full amount of the dishonored checks within a short time

after said checks were dishonored; that Henry R. Weyeneth, president and owner of appellant corporation, had no knowledge of the odometer tampering and took no part therein; that Mr. Weyeneth made reasonable offers to replace one of the vehicles or to pay the purchaser the "Blue Book" difference in price based on the true and false odometer readings but that such offers were declined by the purchaser; that during the past two years Mr. Weyeneth has not been able to draw a salary from the corporation because of its operating at a loss; that Mr. Weyeneth has five minor children and a wife all supported entirely from the dealership; that Mr. Weyeneth has had to refinance his home, refinance his business property and borrow money in order to operate the business and to provide for his family; that while the business is improving, a suspension would have serious effects on it; that Mr. Weyeneth has been operating an automobile dealership for 20 years; that this is the first disciplinary action brought against him and that he has a good reputation as a dealer in the locality in which the business is maintained.

On October 7, 1971, the Director of Motor Vehicles adopted the Proposed Decision of the Hearing Officer. An appeal was timely filed with this board pursuant to Article 3, Chapter 6, Division 2, of the Vehicle Code. Appellant did not attack any of the director's findings nor did it raise any questions of law. Appellant merely contended that the penalty imposed by the director was not commensurate with the findings.

IS THE PENALTY IMPOSED BY THE DIRECTOR OF MOTOR VEHICLES COMMENSURATE WITH HIS FINDINGS?

On three previous occasions we have had before us on appeal cases wherein odometer tampering was an issue (Denis Dodge v. Department of Motor Vehicles, A-9-70; Zar Motors v. Department of Motor Vehicles, A-17-71; and Chase-Nesse Auto, Inc. v. Department of Motor Vehicles, A-19-71). In each case the penalty imposed by the Director of Motor Vehicles revoked the license, certificate and special plates of the appellant and this board affirmed.

In Zar Motors v. Department of Motor Vehicles, we said:

> "This board regards the manipulation of an odometer for the purpose of reducing the mileage indicated thereon as one of the most serious wrongs that a licensee or non-licensee can commit in the sale of an automobile. It is common knowledge that buyers of used vehicles rely on the odometer readings when deciding whether to buy a certain vehicle and at what price. Reducing the number of miles on the odometer is a fraudulent means of deceiving the buyer with respect to a material fact which he relies upon in making his decision.
>
> "The practice of odometer tampering on the part of licensees is fraught with evils other than defrauding innocent purchasers. It severely tarnishes the image of all motor vehicle dealers, including those who do not resort to such fraudulent conduct and gives the dishonest dealer an unfair business advantage over the ethical dealer in a business that is highly competitive. If such conduct were allowed to go unchecked by the licensing authority, it would have a highly corruptive effect upon the retail automobile industry."

We are, of course, cognizant of the factors in mitigation found by the Director of Motor Vehicles and urged upon us by appellant via its brief and oral arguments. However, no facts

have been presented that would warrant a reduction of the penalty. Viewing the matter most favorable to appellant, gross apathy towards business conduct and applicable laws is demonstrated by the issuance of checks subsequently dishonored and managing affairs in a manner permitting customers to be deceived.

The finding that appellant's president was unaware that the odometer tampering was occurring provides no basis for penalty reduction. Mr. Weyeneth's lack of such knowledge in no way decreases the harm to the public and the ethical dealer; it is elementary and unchallenged by appellant that appellant is responsible for all acts of its employees performed in the conduct of the licensed business.

The Decision of the Director of Motor Vehicles is affirmed in its entirety.

This Final Order shall become effective May 26, 1972.

AUDREY B. JONES	PASCAL B. DILDAY
MELECIO H. JACABAN	ROBERT B. NESEN
WINFIELD J. TUTTLE	ROBERT A. SMITH

DISSENT

I dissent:

The 15-day license suspension and one-year probation ordered

by the department are inadequate in this case. Moreover, the penalty is entirely inconsistent with the penalty which the department has imposed, and which this board has upheld, in three recent decisions involving odometer rollbacks. In all of the other three cases the department ordered revocation and we affirmed.

This was an appropriate case for us to either (1) exercise our power under Vehicle Code Sections 3054(f) and 3056 to reverse the decision of the department, on the ground that the penalty is not commensurate with the findings, and to direct the department to reconsider the matter of penalty in the light of the seriousness of the appellant's misconduct and of the public interest, or (2) exercise our power under Vehicle Code Section 3055 to modify the penalty by imposing a penalty of revocation.

This conclusion seems inescapable in view of the language which the majority has quoted from our final order in the Zar Motors appeal.

The first odometer case of the three referred to was Denis Dodge, which we decided on January 4, 1971. That case involved 40 violations involving careless business practices, namely, late notices of sale and late reports of sale and false certificates of nonoperation. In addition, it involved four odometer rollbacks. The second case, Zar Motors, which we decided on February 10, 1972, involved nine odometer rollbacks and criminal

convictions arising therefrom. Chase-Nesse Auto, Inc., which we decided on February 29, 1972, involved one failure to give timely notice of transfer, one filing of false date of first operation, one overcharge of registration fees ($2.00), one misuse of dealer's plates, and four odometer rollbacks.

Here, we were presented a record of admitted odometer rollbacks of approximately 30,000 miles in each of three instances, and, in addition, the issuance by appellant of seven checks to the department for fees which had been collected by the appellant from its customers for payment to the state, all of which were dishonored by appellant's bank when presented for payment. This is conduct closely akin to misappropriation of trust funds and embezzlement, as counsel for the department suggested at the administrative hearing (R.T. 48:3-14).

The dishonored checks were not issued because of any error in appellant's record keeping. They were issued at different times during a period of over sixteen months. The dishonored checks totaled $1,079.00.

By way of "mitigation" of the check violations, appellant's president testified that, when he issued the checks, he did not determine whether or not there were funds sufficient to cover the checks (R.T. 31:2-3). Other evidence proved that he had no need to make this determination; it was his standard business practice to write checks against the account without sufficient funds (Appellant's Exhibit D). He offered no excuse or explanation

of how or why the funds entrusted to it by appellant's customers for payment to the state had been expended by appellant for other purposes. Appellant did, however, offer in evidence in "mitigation" Appellant's Exhibit D, a series of ledger sheets of appellant's commercial account, covering a period of several months, which certainly substantiated appellant's president's testimony that appellant on many, many occasions overdrew its account. The overdrafts amounted to thousands of dollars.

The director adopted a finding of the hearing officer that the dishonored checks were paid by appellant within a "short" time after they were dishonored. This "finding" was apparently based upon the unsupported assertion of appellant's counsel at the administrative hearing. This contention was, somewhat surprisingly, acquiesced in by the department's counsel and accepted as true by the hearing officer (see the colloquy, R.T. 28:22 to R.T. 29:6). However, the record contains no evidence whatsoever to support that finding. The evidence does establish the length of time that expired between appellant's issuance of three of the dishonored checks and the dates on which they were ultimately paid. Check No. 3462 for $241.00 was issued September 9, 1970; it was not paid until October 19, 1970, forty days later. Check No. 3550 for $282.00 was issued October 2, 1970, but collection was not effected until November 6, 1970, thirty-five days later (Department's Exhibit 3, page 2, of declaration of Albert P. Harrington). Check No. 4570 for $297.00 was issued March 18, 1971,

but collection was not effected until April 22, 1971, thirty-five days later (Appellant's Exhibit C, R.T. 29:8-28). There was no evidence that any of the dishonored checks were made good in a shorter period.

Appellant offered no evidence whatsoever of mitigating circumstances attending the admitted, fraudulent odometer roll-backs. Instead, while admitting to the rollbacks, appellant's president evaded questions by the hearing officer when he sought to determine how and why the rollbacks occurred, and who caused them to occur. Appellant's president inconsistently contended that (1) he had no knowledge of the matter, and (2) he didn't care to divulge the knowledge that he had of the matter (R.T. 43:14 to R.T. 44:9; R.T. 44:26 to R.T. 46:12).

In view of the nature of the charges here, and particularly in view of the fact that they were admitted by appellant, I find the appearance and testimony of appellant's witness, Abbey, most remarkable. Abbey's sole contribution as a "Special Investigator with the Department of Motor Vehicles," from the office which had jurisdiction over appellant, was to attest to appellant's "good reputation" as an automobile dealer. Counsel for the department declined to cross-examine Abbey. (R.T. 40:15 to R.T. 41:16.) One can only conclude that members of the community holding this opinion were not informed of appellant's business practices as disclosed by the record.

Oddly, counsel for the department declined to cross-examine appellant's president at the administrative hearing, and left this task to the hearing officer (R.T. 34:18; 40:7-9; 47:3). The hearing officer, as an impartial arbiter, was at somewhat of a disadvantage in pursuing the role of an adversary to appellant. Indeed, the hearing officer complained of this while he was examining Mr. Weyeneth: "Well, going back into the evidence again -- I really have to do this, and I don't like to -- " (R.T. 45:11-12).

Even more surprisingly, counsel for the department made no specific recommendation to the hearing officer on the only issue before him, namely, the penalty, even though the hearing officer requested a recommendation: "Well, I think you ought to make a recommendation." Department's counsel also waived opening argument! (R.T. 41:25 to R.T. 42:6; R.T. 47:11 to R.T. 48:20.) There may be some valid reason for the forebearance of the department's counsel, but it is not apparent from the record. The department and the public do not appear to have been adequately represented, and the hearing officer was put in an adversary role as a result. Perhaps the leniency of his recommended penalty was the result of this circumstance.

On the same day that we heard the instant appeal, we heard an appeal from a decision of the director imposing a total of thirty-five days suspension, based upon a record which the department

conceded did not involve fraud or corrupt business practices, and in which it was admitted that no accusation would have been filed had there not been a charge involving an honest difference of opinion as to the legal construction of language in a statute governing a technicality in the manner of handling registration and license fees. The suspensions in that case were ordered to run concurrently for fifteen days, a penalty closely akin to the penalty which is imposed in the instant case. It is this board's duty, among other things, to require that discipline imposed by the department upon licensees be reasonably just and equal. A comparison of the records and of the penalties with which we were concerned in these two cases, heard the same day, demonstrates that the department is not imposing discipline consistently with justice and equality. The majority's opinion itself reveals that the department has been unfair and inconsistent in the matter of discipline. The results in the four odometer cases which we have heard cannot be reconciled. There was strong reason for sympathy in the other cases, just as there was in the instant case, for the family of appellant's president. However, sympathy has no place in deliberations concerned with protection of the public. It is our duty to correct this inconsistency.

The injustice which the majority upholds here is to the innocent future customers who rely upon the department, and upon us, to assure that new car dealer licensees are ethical and

financially and morally responsible. The majority has chosen to overlook or ignore our responsibility.

The penalty imposed by the director does not adequately protect the public interest. In Zar, this board stated in its final order, affirming revocation: "The record before us abundantly establishes that the methods employed by appellants in the conduct of their business were severely lacking the qualities demanded by the law" and the "...only way of making certain that appellants will not perpetuate further frauds upon purchasers of automobiles is to remove them from the business." These observations apply with equal force to the record in the instant case.

Appellant's license as a new car dealer should have been revoked.

ROBERT B. KUTZ

have been presented that would warrant a reduction of the penalty. Viewing the matter most favorable to appellant, gross apathy towards business conduct and applicable laws is demonstrated by the issuance of checks subsequently dishonored and managing affairs in a manner permitting customers to be deceived.

The finding that appellant's president was unaware that the odometer tampering was occurring provides no basis for penalty reduction. Mr. Weyeneth's lack of such knowledge in no way decreases the harm to the public and the ethical dealer; it is elementary and unchallenged by appellant that appellant is responsible for all acts of its employees performed in the conduct of the licensed business.

The Decision of the Director of Motor Vehicles is affirmed in its entirety.

This Final Order shall become effective_____.

AUDREY B. JONES

PASCAL B. DILDAY

Melecio H. Jacaban

MELECIO H. JACABAN

ROBERT B. NESEN

WINFIELD J. TUTTLE

ROBERT A. SMITH

DISSENT

I dissent:

The 15-day license suspension and one-year probation ordered

6-16-71

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DISSENT

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4-16-71

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WINFIELD J. TUTTLE

ROBERT A. SMITH

DISSENT

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The 15-day license suspension and one-year probation ordered

9-16-71

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The Decision of the Director of Motor Vehicles is affirmed in its entirety.

This Final Order shall become effective _____.

Audrey B. Jones

AUDREY B. JONES

PASCAL B. DILDAY

MELECIO H. JACABAN

ROBERT B. NESEN

WINFIELD J. TUTTLE

ROBERT A. SMITH

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financially and morally responsible. The majority has chosen to overlook or ignore our responsibility.

The penalty imposed by the director does not adequately protect the public interest. In Zar, this board stated in its final order, affirming revocation: "The record before us abundantly establishes that the methods employed by appellants in the conduct of their business were severely lacking the qualities demanded by the law" and the "...only way of making certain that appellants will not perpetuate further frauds upon purchasers of automobiles is to remove them from the business." These observations apply with equal force to the record in the instant case.

Appellant's license as a new car dealer should have been revoked.

ROBERT B. KUTZ

STATE OF CALIFORNIA

NEW CAR DEALERS POLICY & APPEALS BOARD

M. R. DIENER, and H. B. DUNNING, dba DIENER MOTORS, a partnership,	)	
Appellant,	)	Case No. A-15-71
vs.	)	Filed:
DEPARTMENT OF MOTOR VEHICLES,	)	December 7, 1971
Respondent.	)	

Time and Place of Hearing:	November 10, 1971, 1:00 p.m. Room 6520 2415 First Avenue Sacramento, CA 95818
For Appellant:	W. Jackson Willoughby Bowers, Sinclair, Schiess, Mitchell & Willoughby 219 Estates Drive P. O. Box 968 Roseville, CA 95678
For Respondent:	Honorable Evelle J. Younger Attorney General By: Dan Weston Deputy Attorney General

FINAL ORDER

A review of appellant's business records covering the period August 1969 through August 1970 was conducted by respondent on September 15 and 16, 1970. Appellant had sold 1,050 automobiles during that period. 170 of those transactions were selected at

random for review by respondent's investigators. The investigators found that in 16 of these 170 transactions, appellant had overcharged automobile purchasers for vehicle license fees in amounts ranging from $1.00 to $21.00. Fourteen of the 16 overcharges occurred during June, July and August 1970; one occurred during January 1970 and the other in February 1970.

The Accusation filed by respondent was heard on June 29, 1971, pursuant to Section 11500 et seq. Government Code. The hearing officer found that appellant had violated Section 11713(g) Vehicle Code in these 16 instances. Section 11713(g) provides in relevant part: "It shall be unlawful and a violation of this code for the holder of any license issued under this article: . . . . (g) To include as an added cost to the selling price of a vehicle, an amount for licensing or transfer of title of the vehicle which amount is not due the state...". Section 11705 Vehicle Code provides that violation of Section 11713(g) is a ground of license suspension or revocation.

The hearing officer further found that during the consecutive three-month period when 14 of the overcharges occurred, appellant's bookkeeper was intermittently on vacation and engaged in training three inexperienced persons in processing appellant's paperwork involving vehicle license fees. When the overcharges were called to the attention of Mr. M. R. Diener on November 5, 1970, by respondent's investigators, he ordered immediate reimbursement of the overcharges to the customers. The hearing officer also

found that appellant adopted a new procedure, after November 5, 1970, of comparing the amount of vehicle license fees due, as computed by the Department of Motor Vehicles, with the amount appellant had charged its customers and submitted to the department and, in any instance of an overcharge being detected, making appropriate reimbursement.

The penalty proposed by the hearing officer was as follows:

"1. The dealer's license, certificate and special plates (D-8663) issued to the respondent partnership, are suspended for ten days. The suspension shall be stayed, however, for one year from the effective date of this decision during which time the respondent shall be on probation to the Director of the Department of Motor Vehicles upon the following terms and conditions:

"(a) Respondent shall obey all laws of the State of California and all rules and regulations of the Department of Motor Vehicles governing the exercise of his privileges as a licensee. The respondent shall not be convicted of any crime, including upon a plea of guilty or nolo contendere.

"2. If and in the event the Director of Motor Vehicles shall determine, after giving the respondent notice and opportunity to be heard, that a violation of probation

has occurred, the Director may terminate the stay and impose the suspension or otherwise modify the order. If the respondent shall comply with the terms of probation for the period of a year, the stay shall become permanent and the respondent shall be fully restored to al license privileges."

On July 13, 1971, the Director of Motor Vehicles adopted the Proposed Decision of the hearing officer to become effective August 12, 1971. Appellant timely appealed to this board on the following grounds:

"1. The decision is not supported by the findings;

"2. The findings are not supported by the weight of the evidence in light of the whole record reviewed in its entirety;

"3. The determination, as provided in the decision of the department, is not commensurate with the findings."

At the administrative hearing, counsel for appellant stipulated that the facts alleged in the Accusation and relating to the 16 overcharges of vehicle license fees were true. He did not stipulate that such facts constitute a violation of Section 11713(g) Vehicle Code. The Reporter's Transcript, at page 4, lines 16-22, recites the following acceptance of the stipulation by the hearing officer: "All right, then it is stipulated between counsel that

the factual matters alleged in Paragraph III, and relating to 16 overcharges of fees -- the stipulation is that such facts are true. It is not stipulated, however, that the facts contained in Paragraph III constitute a violation of Section 11713(g); the stipulation does not cover that point."

The administrative record reveals that in its Petition for Reconsideration, appellant "...admitted that it did, by mistake, overcharge the 16 items alleged, but denies that it is thereby guilty of violation of Section 11713(g), justifying disciplinary action under Section 11705 of the Vehicle Code."

In oral argument before this board, appellant conceded that the overcharges for vehicle license fees as alleged by the department did occur but contended that such acts did not justify disciplinary action or, if the Board did not agree with this contention, the penalty imposed by the Department of Motor Vehicles was excessive in view of all of the circumstances.

The findings are supported by the weight of the evidence.

Appellant directs our attention to Merrill v. Department of Motor Vehicles, 71 Cal.2d 907, and argues that the case compels a holding that an automobile dealer may not be disciplined for overcharging a customer for vehicle license fees in the absence of a showing that the dealer was either "unscrupulous or irresponsible". Appellant maintains that the record controverts any contention that appellant was either unscrupulous or irresponsible. The language of the Merrill case that appellant focuses upon is as follows:

". . . we consider that the dominant concern of the statutory scheme is that of protecting the purchaser from the various harms which can be visited upon him by an irresponsible or unscrupulous dealer. It is within this context that we now address ourselves to the specific phrase whose interpretation is here in question."

Appellant's first and third grounds of appeal stand or fall upon the applicability of the Merrill case urged by appellant.

We reject appellant's argument as we do not believe the Merrill case either requires or authorizes us to consider the dealer's character, reputation or state of mind when deciding whether there was or was not a violation of Section 11713(g) Vehicle Code.

In the Merrill case, the Supreme Court of California was faced with determining the proper meaning of the word "bona fide" as it is used in Section 11701 Vehicle Code.1/ The Department of Motor Vehicles had refused to issue a dealer's license to Merrill (dba The Merchandiser) on the basis, among others, that the applicant was not a "bona fide" dealer, as that term is used in Section 11701 Vehicle Code, because the applicant did not have and did not intend to have an inventory of new automobiles for sale to the public. In upholding Merrill, the court concluded that, "Viewing the term 'bona fide' within the entire statutory

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1/ "Sec. 11701. Every manufacturer of, transporter of, or dealer in vehicles of a type subject to registration or of snowmobiles shall make application to the department for a license and certificate containing a general distinguishing number. The applicant shall submit proof of his status as a bona fide manufacturer, transporter, or dealer as may reasonably be required by the department."

scheme in which it appears, we conclude that it is there used in the first lexical sense adverted to above -- to wit, that of honesty, fair dealing and freedom from deceit." The court rejected the department's contention that it could find a dealer-applicant was not "bona fide" on the basis that the dealer-applicant had no automobile inventory and did not anticipate obtaining such inventory.

In our view, the Merrill case merely precludes the department from imposing upon an applicant for a dealer's license, under the requirement that the applicant be a "bona fide" dealer, standards of conduct or other requirements not related to the applicant's honesty, fair dealing and freedom from deceit. There was no issue in Merrill that Merchandiser fell within the definition of "dealer".

The holding in the Merrill case has no bearing whatever on the proper interpretation of Section 11713(g) Vehicle Code.

We should note, in passing, that the Supreme Court in Merrill, expressly recognized legislative goals in the statutory scheme governing the licensing of automobile dealers other than honesty and integrity, and that among the grounds for license discipline are violations dealing with the registration of motor vehicles, including "addition of unauthorized costs to the selling price", citing subdivision (g) of Section 11713 (see page 919 of the opinion). The court concludes, at page 920, "...that the dominant concern of this statutory scheme is that of protecting the purchaser from the various harms which can be visited upon him by an irresponsible or unscrupulous dealer." As discussed below, we feel that a dealer

who overcharges his customers when he collects license fees is neither "scrupulous" nor "responsible", and certainly he cannot be said to be reliable, another attribute required of California dealers by the Legislature, according to the Merrill decision.

IS THE PENALTY IMPOSED BY THE DIRECTOR OF MOTOR VEHICLES COMMENSURATE WITH THE FINDINGS?

We take note that appellant has been in business since 1954, and that it has been free from any difficulties with the Department of Motor Vehicles heretofore. We also note that the overcharges were immediately refunded to the appropriate parties when brought to the personal attention of M. R. Diener by the investigators, and that the dealership thereupon adopted new procedures to assure immediate refunding when an overcharge of vehicle license fee is detected.

We do not, however, consider as a mitigating circumstance the fact that most of the wrongful acts occurred when appellant's bookkeeper was either on vacation or engaged in training new personnel in work involving the processing of vehicle license fees. In our view, a careful and prudent dealer would have arranged for an adequate degree of supervision over the inexperienced personnel to assure that the customers were charged the correct amounts as required by the law, or in the event of inadvertent overcharge, which reasonable care could not prevent, that funds belonging to purchasers would be promptly refunded. This was not done and, further, the evidence preponderates to the view that the dealership did not take the precaution

of having the work of the inexperienced personnel reviewed by the bookkeeper when she returned to work after her vacation absences.

An automobile dealer has a duty to determine at the time a vehicle is sold at retail the correct license fee. The Department of Motor Vehicles and the board recognize that honest errors in computation can occasionally occur. If an error is made, however, and an overcharge results, the dealer is clearly under a duty to reimburse the buyer any excess amount charged for such fees whether the error is found when the bundle sheet is being prepared by the dealership or after the bundle sheet is returned to the dealership by the Department of Motor Vehicles. These obligations do not place an unreasonable burden upon a dealer.

In this case, the evidence showed that in the random sample of 170 transactions, the appellant overcharged the customer on 16 occasions, nearly one time out of 10. Appellant's method of operation did not result in prompt refunding of the overcharges. "Scrupulous" is defined in Webster's Seventh New Collegiate Dictionary as, "Full of or having scruples; inclined to scruple; careful; exact; punctilious," and "scruple", as, "...2: to be reluctant on grounds of conscience; hesitate." The license fees are subject to exact determination from information provided by the Department of Motor Vehicles if prudent business methods are

employed. The appellant's admitted course of dealings with customers with regard to collection of license fees was "unscrupulous" and "irresponsible" in the instances admitted to by stipulation.

The penalty permits the appellant to continue its business of selling motor vehicles. The conditions of probation merely require that appellant do that which all vehicle dealers are obligated to do; i. e., obey all laws of the State of California and the regulations of the Department of Motor Vehicles governing the exercise of the privileges as a licensee. Should appellant do so, the ten-day stayed suspension is of no consequence. Should it not do so, the Director of Motor Vehicles may remove the stay or a portion thereof after giving appellant notice and opportunity to be heard.

We find the penalty imposed by the Director of Motor Vehicles to be both appropriate and equitable under the circumstances of the case as reflected by the administrative record.

The Decision of the Director of Motor Vehicles is affirmed in its entirety.

This Final Order shall become effective December 22, 1971.

# # #

GILBERT D. ASHCOM, President

ROBERT B. KUTZ

PASCAL B. DILDAY

MELECIO H. JACABAN

ROBERT D. NESEN

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The penalty permits the appellant to continue its business of selling motor vehicles. The conditions of probation merely require that appellant do that which all vehicle dealers are obligated to do; i. e., obey all laws of the State of California and the regulations of the Department of Motor Vehicles governing the exercise of the privileges as a licensee. Should appellant do so, the ten-day stayed suspension is of no consequence. Should it not do so, the Director of Motor Vehicles may remove the stay or a portion thereof after giving appellant notice and opportunity to be heard.

We find the penalty imposed by the Director of Motor Vehicles to be both appropriate and equitable under the circumstances of the case as reflected by the administrative record.

The Decision of the Director of Motor Vehicles is affirmed in its entirety.

This Final Order shall become effective _____.

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STATE OF CALIFORNIA

NEW CAR DEALERS POLICY & APPEALS BOARD

PETER N. ZAR, and DONALD J. FISHER, dba ZAR MOTORS, Appellants, vs. DEPARTMENT OF MOTOR VEHICLES, Respondent.	)	Case No. A-17-71 Filed: February 10, 1972

Time and Place of Hearing:	January 12, 1972, 1:00 p.m. Leininger Community Center City of San Jose Kelley Park 1300 Senter Road San Jose, California
For Appellant:	William F. Locke-Paddon Wyckoff, Parker, Boyle & Pope P. O. Box 960 Watsonville, CA 95076
For Respondent:	Honorable Evelle J. Younger Attorney General By: Victor D. Sonenberg Deputy Attorney General

FINAL ORDER

In the decision ordered on September 2, 1971, by the Director of Motor Vehicles, pursuant to Chapter V, Part 1, Division 3, Title 2, Government Code, it was found that appellants, Peter N. Zar and Donald J. Fisher, had, in nine instances, disconnected, turned back or reset the odometers on certain motor vehicles in order to reduce the mileage indicated on the odometer gauges,

and that each appellant had been convicted in the Superior Court, County of Santa Cruz, State of California, on pleas of guilty of the criminal offense of Conspiracy to Obtain Money and Property by False Pretenses, Section 182.4 of the California Penal Code, a crime involving moral turpitude. It was further found that appellants had operated a Chrysler-Plymouth agency in Santa Cruz County since 1957 and employed 16 persons.

The Director of Motor Vehicles revoked the license, certificate and special plates of the dealership.

An appeal was timely filed with this board pursuant to Article 2, Chapter 6, Division 2, Vehicle Code.

Appellants' arguments follow three avenues. One, the Board should receive evidence that was available at the time of the administrative hearing but was not presented because appellants were not represented by counsel; two, the Board should receive evidence of facts occurring after the administrative hearing; and, three, the penalty imposed by the Director of Motor Vehicles is excessive.

Turning to the question of receiving evidence not introduced at the hearing, we are mindful that our powers in this regard are limited to receiving relevant evidence, which, in the exercise of reasonable diligence, could not have been produced at the administrative hearing or which was improperly excluded at such hearing (Section 3054(e) Vehicle Code). However, appellants contended that they were not represented by counsel at the

administrative hearing because appellants were dissuaded by an employee of respondent's, a Mr. Brown, from being so represented and, because of this lack of representation, relevant evidence was not produced. We believed it incumbent upon this board to receive evidence on that issue and make a finding thereon. Accordingly, appellants were permitted to present evidence on the issue.

Both appellants testified concerning a conversation they had with Mr. Brown which, according to them, formed the basis for deciding to represent themselves at the administrative hearing.

Appellant Fisher testified that "...Mr. Brown assured me this way that in a hundred per cent of the cases, they generally don't take your license away from you. And I asked if I should take a lawyer with me, and he said he didn't feel it would be necessary, that there would be a hearing in San Jose. And Mr. Brown, and I, and Mr. Brajen." (App. Hr. Tr., P.13, lines 19-24.)

Appellant Zar testified that he "...talked to Mr. Brown at the used car lot," but did not ask, "...what he should do about the hearing." "...Don called Mr. Fisher (sic), and he says: 'We don't need an attorney down there.' I didn't, myself. That's what Mr. Fisher told me, my partner. He says: 'I called Mr. Brown, and we don't need no attorney.'" (App. Hr. Tr. P.19, lines 4-10.)

Respondent produced in rebuttal Mr. Henry Hoover who testified that he was the supervisor of Mr. Brown's supervisor and also worked closely with Mr. Brown; that about a week to 10 days before the

administrative hearing, Mr. Hoover met with appellants at their request. This witness then testified:

"Q And what was the nature of this conversation?

"A Well, originally I talked to them on the phone. They desired to make an appointment and come to my office in Campbell and discuss with me the administrative hearing that was coming up. And we made the appointment for the next day, or possibly two days thereafter, and Mr. Fisher and Mr. Zar came over to my office, and we discussed the hearing that was pending against their license.

"Q Was there any discussion about the seriousness or the consequences of the hearing?

"A During the course of the conversation, I did indicate to them that the matter against them was of serious nature.

"Q And what was their response?

"A Well, their response in discussions -- actually, it began a little bit before that, they had indicated that, wanted to know what the hearing was about, and how it operated, and I explained this to them. And one or the other, either Mr. Zar or Mr. Fisher, and I do not recall which, indicated that they had talked to Mr. Brown, and that Mr. Brown had told them that an attorney was not required at the hearing. And we discussed this, and I informed them that it was true, that an attorney was not legally required, but that they were entitled to an attorney and that I personally would recommend to them that they consider hiring counsel to represent them at the hearing. Mr. Fisher or Mr. Zar, one or the other, indicated they were not going to hire an attorney to appear at the hearing because it was too expensive, and it was just pouring good money after bad.

"Q Was there ever any statement made regarding probability that their license would not be suspended?

"A I do not recall any such conversation in my office with them regarding that matter.

"Q And did you, yourself, make any statement along those lines about the probability of their license --

"A I do not recall. It may or may not have been discussed. I really don't remember. The only thing, my memory is that I talked to them about the seriousness of the situation, but whether I specifically told them that their license could be placed on probation, or suspended, or revoked, I can't say. This would be a normal thing that I would say, but I would not desire to testify that I said this, because I have no specific recollection to that effect.

"Q But you do recall that you said that the matter was serious?

"A That's correct." (App.Hr.Tr., P.25, line 4 to P.26, line 22.)

We have carefully weighed the testimony given on this issue and we find that the information Mr. Hoover conveyed to appellants was sufficient to correct any erroneous information that they may have received from Mr. Brown. Mr. Hoover's unrebutted testimony clearly discloses that he did all that could be reasonably expected to place the matter of the accusation filed against appellants in its proper perspective. Appellants had adequate time to weigh the information given by Mr. Hoover and seek the services of a lawyer, but they failed to do so and elected to represent themselves.

Before leaving this issue, we take note of a document in the administrative record which tends to refute the testimony of appellants that they were not aware that the administrative proceedings facing them could result in the penalty imposed by the Director of Motor Vehicles. The record shows that appellants acknowledged on June 28, 1971, receiving a copy of the Accusation filed in this case by the Department of Motor Vehicles on

June 24, 1971. The accusation prays that the department take "...such action to revoke or suspend the license, certificate and special plates of respondent herein as it may deem proper under the circumstances." In view of the quoted language, it is our opinion that appellants were, or should have been, aware of the possible consequences flowing from the administrative proceedings.

In Borror vs. Department of Investments, Division of Real Estate, 15 Cal.App.3d 531, the court said:

> "As to the penalties involved, it is inconceivable that a licensee is not aware by virtue of the licensing procedures of the sanctions which may be imposed for violation of his duties and obligations as such licensee. A real estate licensee is required to be aware of the provisions of the Real Estate Law. (See Bus. & Prof. Code, Section 10153, Subd.(c), 10177 and 10185). Moreover in the present case, the licensee was aware that revocation of her license was sought by the proceedings since such penalty was specifically requested in the prayer of the Accusation." (Emphasis added.)

Notice of Time and Place of Hearing, dated July 30, 1971, is also a part of the administrative record and was duly served upon appellants. It recites, among other things, "You may be present at the hearing; may be represented by counsel, but need not be represented by counsel if you so desire; may present any relevant evidence..."

Appellants offered to prove that Chrysler-Plymouth Corporation, while being entitled to do so, had not terminated appellants' franchise but, on the contrary, "...fully supports and endorses appellant's continued franchised relationship." Also, although being aware of appellants' convictions and the revocation pro-

ceedings, the franchisor is considering granting a franchise to appellants for the operation of a Dodge dealership in Watsonville, California. We rejected the offer of proof as we do not consider relevant the acts or intentions of the franchisor with reference to the continuation of the existing franchise or the granting of a new one. The factors influencing the franchisor to make whatever decision it has made concerning enfranchisement may be, and probably are, far different from those that we must consider.

IS THE PENALTY IMPOSED BY THE DIRECTOR OF MOTOR VEHICLES COMMENSURATE WITH HIS FINDINGS?

Appellants argue on appeal that the penalty should be lessend because their license has been ordered revoked for participating in a practice which only became illegal in 1967; a practice which had been widely practiced in the indsutry; a practice which does not directly relate to appellants' principal activities of new car sales and service; and that three years is a scant time for an obscure section of the Vehicle Code to become widely known. Appellants further argue that a combination of the fine and probationary sentence imposed by the criminal court and the revocation of the license by the Department of Motor Vehicles constitutes a "grossly excessive" penalty.

The California Legislature concluded many years ago that it was in the public interest to protect automobile purchasers in their dealings with persons engaging in the business of selling automobiles at retail by licensing persons engaging in such

business. Accordingly, a statutory scheme was enacted which, in addition to vesting in the Department of Motor Vehicles the authority to issue licenses to vehicle dealers, set forth standards of conduct for such licensees; e. g., Sections 11705 and 11713 Vehicle Code. Deviations from these standards may result in revocation of a license, or the imposition of a lesser sanction, by the Director of Motor Vehicles.

While a dealer-licensee could have been prosecuted in a judicial proceeding under other laws prior to 1967 for defrauding customers through the disconnecting or resetting odometers, it was not until 1967 that legislation on the specific subject was enacted. Among other statutes dealing with odometers, Section 28051 was added to the Vehicle Code in 1967 as follows:

> "It is unlawful for any person to disconnect, turn back or reset the odometer of any motor vehicle with the intent to reduce the number of miles indicated on the odometer gauge." (Amendments to this section during 1968 and 1969 are not relevant to this case.)

During 1967, subsection (n) was added to Section 11713 Vehicle Code making a violation of Sections 28050 or 28051 a basis for disciplinary action against a dealer. In enacting subsection (n), the Legislature gave the Department of Motor Vehicles a specific statutory tool designed to prevent an evil which was being perpetrated upon buyers of motor vehicles by some licensed dealers. That tool was not provided for the purpose of punishing dealers but was provided for the purpose of removing, either temporarily or permanently, the erring dealer from the business of selling

automobiles.

This board regards the manipulation of an odometer for the purpose of reducing the mileage indicated thereon as one of the most serious wrongs that a licensee or non-licensee can commit in the sale of an automobile. It is common knowledge that buyers of used vehicles rely on the odometer readings when deciding whether to buy a certain vehicle and at what price. Reducing the number of miles on the odometer is a fraudulent means of deceiving the buyer with respect to a material fact which he relies upon in making his decisions.

The practice of odometer tampering on the part of licensees is fraught with evils other than defrauding innocent purchasers. It severely tarnishes the image of all motor vehicle dealers, including those who do not resort to such fraudulent conduct, and gives the dishonest dealer an unfair business advantage over the ethical dealer in a business that is highly competitive. If such conduct were allowed to go unchecked by the licensing authority, it would have a highly corruptive effect upon the retail automobile industry. The extent to which odometer tampering may have been engaged in by members of the automobile retail industry certainly cannot be urged in mitigation of appellants' conduct. Appellants cannot be heard to say that their wrongful conduct was less wrongful merely because others in a similar position had been or are engaging in the same practice. Standards for a licensee's conduct are established by law, not by the practice of others in the business

or profession. (See Stevenson vs. Board of Medical Examiners, 10 Cal.App.3d 433.)

We dispose of the assertion that odometer tampering on the part of appellants was a practice not directly related to their principle activities of new car sales and services by pointing out the obvious fact that the wrongful conduct was directly related to appellants' licensed business; i.e., the sale of vehicles at retail.

We reject in its entirety the contention that "...three years is scant time for an obscure section of the Vehicle Code to become widely known." A licensee is required to be aware of the provisions of the laws governing conduct of licensees. (Borror vs. Department of Investments, 15 Cal.App.3d 531.) We are persuaded that an accurate recital of appellants' attitude towards the laws governing odometer tampering is contained in Mr. Zar's testimony that "...we didn't pay any attention to the law." (RT 7, lines 12-13.) Moreover, odometer tampering was obviously immoral and criminal conduct prior to the enactment of Section 28051 Vehicle Code.

In determining the appropriate administrative sanction in the case before us, we are not unmindful of the substantial fine imposed upon both Mr. Zar and Mr. Fisher in the criminal proceeding and the length of the probationary period imposed therein. The judicially imposed penalty has the effect of punishing the wrongdoers for unlawful conduct and tends to discourage them from again engaging in fraudulent conduct. However, the only way of making

certain that appellants will not perpetrate further frauds upon purchasers of automobiles is to remove them from the business.

> "It is well settled that the revocation or suspension of a license is not penal in nature but is a mechanism by which licensees who have demonstrated their ignorance, incompetency or lack of honesty and integrity may be removed from the licensed business. The legislation was not intended to provide for punishment but to afford protection of the public. Furnish v. Board of Medical Examiners, 149 Cal.App.2d 326, 308 P.2d 924; Bold v. Board of Medical Examiners, 135 Cal.App. 29, 26 P.2d 707; Traxler v. Board of Medical Examiners, 135 Cal.App.37, 26 P.2d 710. Or, as stated in another way, the purpose of the proceeding is to determine the fitness of the licensee to continue in that capacity and thus to protect society by removing, either temporarily or permanently, from the licensed business or profession, a licensee whose methods of conducting his business indicate a lack of those qualities which the law demands. West Coast Home Improvement Co., Inc. v. Contractor's State License Board, 72 Cal.App.2d 287, 301, 164 P.2d 811; in re Winne, 208 Cal. 35, 41, 280 P. 113." (Meade v. State Collection Agency Board, 181 Cal.App.2d 774.)

The record before us abundantly establishes that the methods employed by appellants in the conduct of their business were severely lacking the qualities demanded by the law. The director's decision to permanently remove appellants from the business of selling motor vehicles is entirely commensurate with the facts of the case.

The Decision of the Director of Motor Vehicles is affirmed in its entirety.

The Final Order shall become effective February 28, 1972.

GILBERT D. ASHCOM

ROBERT B. KUTZ

PASCAL B. DILDAY

ROBERT D. NESEN

AUDREY B. JONES

ROBERT A. SMITH

WINFIELD J. TUTTLE

STATE OF CALIFORNIA

NEW CAR DEALERS POLICY & APPEALS BOARD

In the Matter of FOULGER FORD, INC., Appellant, vs. DEPARTMENT OF MOTOR VEHICLES, Respondent.	)	Appeal No. A-18-71 Filed: February 29, 1972

Time and Place of Hearing:	February 9, 1972, 1:30 p.m. Director's Conference Room Department of Motor Vehicles 2415 First Avenue Sacramento, California
For Appellant:	Connolly Oyler Attorney at Law Gerlach, Harker, Langworthy & Oyler 15233 Ventura Boulevard, Suite 400 Sherman Oaks, CA 91403
For Respondent:	Honorable Evelle J. Younger Attorney General By: Frank A. Iwama Deputy Attorney General

FINAL ORDER

On December 10, 1970, the Department of Motor Vehicles, hereinafter referred to as "respondent", filed an accusation against Foulger Ford, Inc., hereinafter referred to as "appellant", charging that appellant:

"...contrary to Section 11713(a) of the Vehicle Code and Section 433.00, Title 13 of the California Administrative Code, caused advertisements to be published in the San Gabriel Valley TRIBUNE on May 24, 1970, and May 31, 1970, examples of which are attached hereto as Exhibit A, and by this reference made a part hereof, which were misleading and inaccurate in material particulars in that on such dates Respondent (Appellant) advertised a 1969 Mustang for sale, License YDM-718 (YDW-718) at prices about at or below Respondent's (Appellant's) cost in order to entice members of the public to Respondent's (Appellant's) place of business to sell different vehicles when in truth and in fact Respondent (Appellant) had no intention of selling, and refused to sell, the 1969 Mustang referred to herein at the advertised prices."

The matter was heard by an officer of the Office of Administrative Procedure on February 3, 1971, and a proposed decision was issued on March 17, 1971. The hearing officer found as follows:

"On May 24, 1970, respondent (appellant) intentionally caused to be published in a newspaper, the San Gabriel Valley Tribune, an advertisement offering to sell to the public a certain automobile, to wit, a 1969 Mustang, license number YDM-718 for the full price of $1,778.00. Said advertisement was misleading in a material particular in that respondent (appellant) did not then and there intend to sell said vehicle at the price so advertised, and respondent (appellant) did intend by said advertisement to lead the purchasing public to believe that the advertised price of said vehicle was the total price of said vehicle, when in fact it was not.

"Said vehicle was again thereafter advertised for the said price of $1,778.00 and was sold for said advertised price on July 6, 1970, following the investigation in this matter."

The Proposed Decision ordered appellant's license, certificate and special plates suspended for a period of ten days, with said suspension being stayed for a period of one year upon condition

that appellant obey all the laws of the United States, State of California, and its political subdivisions, and comply with all the rules and regulations of respondent.

Respondent did not adopt the Proposed Decision. Following notice and written argument, pursuant to Section 11517(c) Government Code, respondent issued a decision adopting the findings and determination of issues in the Proposed Decision but ordered that appellant's license, certificate and special plates be suspended for a period of ten days with seven of said ten days stayed for a period of one year on condition that appellant obey the laws of the United States, State of California, and its political subdivisions, and comply with all the rules and regulations of respondent.

An appeal was timely filed with this board pursuant to Article 3, Chapter 6, Division 2, of the Vehicle Code, urging that the Board find that appellant did not violate Section 11713(a) Vehicle Code nor Section 433.00, Title 13, California Administrative Code, or in the alternative, exercise its penalty determination powers by fixing a penalty consistent with that proposed by the hearing officer.

We reverse the Decision of the Director of Motor Vehicles in its entirety as we do not find any evidence in the administrative record that appellant violated either Section 11713(a) Vehicle Code or Section 433.00, Title 13, California Administrative Code.

ARE THE FINDINGS OF THE DIRECTOR OF MOTOR VEHICLES SUPPORTED BY THE WEIGHT OF THE EVIDENCE IN LIGHT OF THE WHOLE RECORD REVIEWED IN ITS ENTIRETY?

In Paragraph III of the Director's Decision, it is recited that: (1) appellant did not intend to sell the vehicle in question for the price advertised and (2) appellant intended by said advertisement to lead the purchasing public to believe that the advertised price of the vehicle was the total price, when, in fact, it was not.

Appellant clearly intended to lead the purchasing public to believe that the advertised price of the vehicle was the total price, but we find no evidence in the administrative record to warrant a conclusion that the advertised price was not, in fact, the total price of the vehicle.

There is nothing in the administrative record to establish that the prospective buyer, Mr. William Bezuhly, Jr., or anyone else, was told by a representative of the dealership that the vehicle was for sale at a price greater than the advertised price of $1,778.00. The hearing officer inquired of Mr. Bezuhly as to whether or not there was any conversation, after Mr. Bezuhly had been informed that the vehicle was advertised only as a weekend special, concerning any other price at which the vehicle would be sold. Mr. Bezuhly replied in the negative (R.T. 28, line 27 to R.T. 29, line 4). Mr. Charles Robert Foulger, general manager and vice president of appellant, testified that he would have accepted Mr. Bezuhly's "...personal check in total." for the

vehicle even though his contact with Mr. Bezuhly was several days following the appearance of the advertisement in the newspaper. This testimony preponderates against a finding that the dealership would sell the vehicle only at a price greater than the amount advertised.

We turn now to that portion of Paragraph III that finds that the advertisement was misleading in that appellant did not intend to sell the vehicle at the advertised amount. Respondent apparently proceeded on the theory that when a new car dealer licensee advertises a vehicle for sale for a given price, on a given date, that he is guilty of misleading advertising if his intent is to sell the car for that price only on the date the advertisement appears in the newspaper, unless the advertisement expressly states that the vehicle will be available for purchase at that price only on the date the advertisement is published. To express the proposition in another way, the respondent apparently believes that when a licensee advertises a given car for a given price on a given day, there is necessarily an implied representation by the licensee that the car will be made available for sale at that price for a "reasonable time", in this case several days, after the advertisement is published, unless such implied representation is expressly negated by language contained within the advertisement specifying a time limit. Counsel for respondent have cited no authority to support such a theory and we have found none. In our view, the invitation contained in an advertisement terminates at the close of the business day on which the advertisement appears, in the absence

of language in the advertisement declaring its duration. While it may be a desirable business practice to follow the theory urged by the respondent, neither the Legislature nor the respondent, through regulations adopted concerning false advertising, have seen fit to impose license discipline upon a dealer who does not adopt this theory in his advertising practices. It may also be a sound business practice to keep a vehicle for sale at the advertised price until it has either been sold or until it has been made the subject of another advertisement but, again, imposing such a requirement must be left to the Legislature or imposed by the Director of Motor Vehicles through his rule-making power.

We are unable to glean from the administrative record any evidence which would support a finding as to what appellant would or would not have done May 24, 1970. There was no contact between Mr. Bezuhly and anyone at the dealership on that date. Mr. Bezuhly "...attempted to call on that first day, that Sunday" (R.T. 4, line 21). He attempted to call the dealership on Sunday but there was no answer (R.T. 17, lines 11-13). The first time he talked to anyone at the dealership was the following Monday (R.T. 17, lines 15-16). Mr. Bezuhly did make contact with the dealership on three consecutive days following the date the advertisement was published and his offers to purchase the vehicle were rejected. In our view, on none of those three days was appellant under any obligation to sell the vehicle at the previously advertised price, or at any price, and appellant's

refusal to sell could not attach a false or misleading quality to the advertisement published by appellant on May 24, 1970.

It is an elementary rule of contract law that an advertisement is not an offer but a mere invitation to others to make offers. (Lonergan v. Scolneck, 129 C.A.2d 179.) "A mere advertisement or request for bids for the sale of particular property or the erection or construction of particular work is merely an invitation for offers, and is not an offer to accept any particular bid. It results in a contract only on the acceptance of a bid." (17 C.J.S. Contracts 48.)

The record before us does not show that Mr. Bezuhly, or anyone else, made an offer to appellant on the date the public was invited to so do. It merely shows that his offer to purchase the vehicle on subsequent dates was rejected. In our view, this well-settled rule of contracts should not be ignored in the absence of a statute or, at least, a regulation thereon. We find no language in either Section 11713 Vehicle Code or Sections 17500 et seq. Business and Professions Code authorizing such a deviation and, as stated, we find no regulation of the Director of Motor Vehicles on this matter.

Indeed, language in Section 11713 Vehicle Code supports the proposition that all that is required of the dealer is to have the vehicle available for sale at the advertised price on the date of publication and that it may be withdrawn from sale at that price thereafter. Subsection (b) in pertinent part provides that it is unlawful and a violation of the Vehicle Code for a dealer:

"To advertise...for sale...in any manner, any vehicle not actually for sale at the premises of such dealer...at the time of the advertisement..." (emphasis added).

Subsection (c) in pertinent part provides that it is unlawful and a violation of the Vehicle Code for a dealer:

"To fail within 48 hours in writing to withdraw any advertisement of a vehicle that has been sold or withdrawn from sale." (Emphasis added.)

The latter subsection is inapplicable here because appellant did not continue to publish the advertisement on May 25, May 26 or May 27. However, in the light of the language of subsection (c), it appears that even had it done so, it would have had the right to withdraw the vehicle from sale so long as it gave the publisher written advice to withdraw the advertisement within 48 hours of the time the vehicle was withdrawn from sale.

Utilization of the familiar retailing device of advertising "leaders" is an acceptable business practice, and that is all that the record establishes as having occurred in this case.

The Decision of the Director of Motor Vehicles is reversed in its entirety.

This final order shall become effective when served upon the parties.

AUDREY B. JONES

ROBERT B. KUTZ

GILBERT D. ASHCOM

PASCAL B. DILDAY

MELECIO H. JACABAN

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This final order shall become effective when served upon the parties.

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"To fail within 48 hours in writing to withdraw any advertisement of a vehicle that has been sold or withdrawn from sale." (Emphasis added.)

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STATE OF CALIFORNIA

NEW CAR DEALERS POLICY & APPEALS BOARD

CHASE-NESSE AUTO, INC., dba EARLE NESSE FORD, Appellant,	)	Case No. A-19-71
vs.	)	Filed: February 29, 1972
DEPARTMENT OF MOTOR VEHICLES, Respondent.	)	

Time and Place of Hearing:	February 9, 1972, 11:00 a.m. Director's Conference Room Department of Motor Vehicles 2415 First Avenue Sacramento, California
For Appellant:	Mr. Earle A. Nesse R. R. 1, Box 20 Sutter Creek, CA 95685
For Respondent:	Honorable Evelle J. Younger Attorney General By: Frank A. Iwama Deputy Attorney General

FINAL ORDER

The Director of Motor Vehicles, pursuant to Chapter 5, Part 1, Division 3, Title 2, of the Government Code, issued a decision, effective November 11, 1971, wherein it was found that appellant: (1) failed in one instance to timely submit to respondent a written notice of the transfer of interest in a certain motor vehicle;

(2) reported to respondent in one instance a date other than the true date for the first date of operation of a certain motor vehicle thereby making a false statement and concealing a material fact in the application for registration of the vehicle; (3) in one instance included as an added cost to the selling price of a certain vehicle a registration fee in excess of the fee due and payable to the state; (4) disconnected, turned back or reset the odometer on four vehicles in order to reduce the mileage indicated on the odometer gauge; and (5) permitted the use of the dealer's special plates in a manner not authorized by law. The Director also found that Earle Nesse, President of appellant, had been convicted in the Justice Court of California, County of Amador, Amador Judicial District, State of California, for the criminal offense of Wilfully and Unlawfully Turning Back or Resetting an Odometer, a violation of Section 11713(n) of the California Vehicle Code, a crime involving moral turpitude.

It was further found that appellant "...systematically followed the practice of resetting odometers in a very substantial fashion." The resetting of odometers occurred mainly on demonstrators resulting in not only misleading the purchasers but also improperly and illegally extending the period of the manufacturer's warranty.

In his original decision, the Director of Motor Vehicles found that appellant's "...president now candidly admits this type of misconduct and concedes that 'perhaps' as many as 20 odometers have been turned back over the last two years or so, he initially only admitted one such incident, gradually adding admissions as

evidence was presented to him." The Director granted appellant's request for reconsideration and, upon reconsidering the matter, amended this finding as follows: "Although respondent's (appellant's) president now candidly admits this type of misconduct and concedes that 'perhaps' as many as twelve odometers have been turned back from January 1970 to January 1971, he initially only admitted one such incident, gradually adding admissions as evidence was presented to him."

The Director of Motor Vehicles ordered the revocation of appellant's license, certificate and special plates. An appeal was timely filed with this board pursuant to Article 2, Chapter 6, Division 2, Vehicle Code.

At the administrative hearing, counsel for appellant stipulated to the truth of all allegations in the accusation with the exception of that portion of Paragraph VII that Mr. Earle A. Nesse "...is not of good moral character" (R.T. 3, lines 24-26).

Appellant denied on appeal that it "systematically" tampered with odometers, as found by the Director, and contended, "It is unrealistic to believe that this occurred in this small community..." (Appellant's Response Brief, P.3). We dispose of the issue by pointing out that there is nothing in the applicable statute, Section 11713(n) Vehicle Code, which requires, as a condition to license discipline, a showing that odometers were manipulated "systematically" or pursuant to an organized or established plan or procedure. The record clearly establishes the nature and extent of appellant's misconduct. We now turn to the remaining issue raised by the appeal.

IS THE PENALTY IMPOSED BY THE DIRECTOR OF MOTOR VEHICLES COMMENSURATE WITH HIS FINDINGS?

This board recently had the occasion to express itself on the seriousness of resetting odometer gauges with the intent to reduce the mileage indicated thereon. (Zar Motors vs. the Department of Motor Vehicles, A-17-71.) We said in that case:

> "This board regards the manipulation of an odometer for the purpose of reducing the mileage indicated thereon as one of the most serious wrongs that a licensee or non-licensee can commit in the sale of an automobile. It is common knowledge that buyers of used vehicles rely on the odometer readings when deciding whether to buy a certain vehicle and at what price. Reducing the number of miles on the odometer is a fraudulent means of deceiving the buyer with respect to a material fact which he relies upon in making his decision.
>
> "The practice of odometer tampering on the part of licensees is fraught with evils other than defrauding innocent purchasers. It severely tarnishes the image of all motor vehicle dealers, including those who do not resort to such fraudulent conduct, and gives the dishonest dealer an unfair business advantage over the ethical dealer in a business that is highly competitive. If such conduct were allowed to go unchecked by the licensing authority, it would have a highly corruptive effect upon the retail automobile industry."

The record before us abundantly establishes that appellant engaged in a course of fraudulent conduct designed to facilitate the sale of automobiles. Appellant's president, Mr. Earle A. Nesse, testified that he was aware that odometer manipulation was occurring at the dealership (R.T. 10, lines 2-3) and that such conduct was wrongful (R.T. 10, line 12). The subject of selling vehicles with high mileage was discussed in meetings with sales personnel and, while odometer manipulation was not specifically approved, it was

understood the dealership would do whatever it could to facilitate the sale of high mileage vehicles (R.T. 10, line 27 to R.T. 11, line 12).

While Mr. Nesse knew that it was wrong to manipulate odometers, he claimed he "...had never really given serious consideration to the implications of doing such a thing" (R.T. 10, lines 12-14).

We note in passing that the odometer manipulation on the part of appellant encompassed more than "high mileage" vehicles. According to Mr. Nesse, the acts occurred primarily on demonstrators (R.T. 20, lines 2-4). The odometers on demonstrators were reset so as to give the original retail buyer additional warranty coverage to which the buyer was not entitled (R.T. 23, lines 4-10). This, of course, perpetrates a fraud upon any subsequent purchaser as well as upon the franchisor, the Ford Motor Company. In its eagerness to sell automobiles, appellant's president and employees apparently gave no consideration to the harm arising from or made possible by their wrongful acts.

The fact that in this case some of the buyers conspired with appellant's employees to commit the unlawful acts, does not in the least excuse the wrongful conduct. Indeed, the existence of the conspiracy renders the conduct even more inimical to the public interest. It appears from the record before us that appellant's president and some of the buyers could very well have been successfully prosecuted for a felony under Penal Code Section 182.

One licensed by the State of California to conduct a business enterprise is under a high duty to avoid conduct of a fraudulent

nature in the pursuit of the licensed business. Appellant fell far short of meeting this standard. Appellant's conduct was such that we have concluded that the public welfare will be served only by revocation of its license.

The Decision of the Director of Motor Vehicles is affirmed in its entirety.

The final order shall become effective March 30, 1972.

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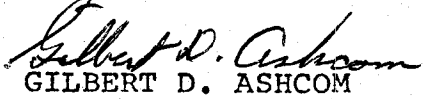

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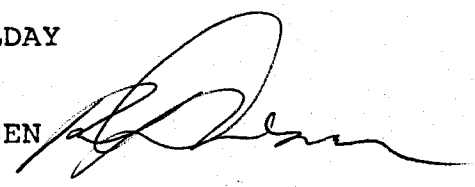

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2415 First Avenue
P. O. Box 1828
Sacramento, CA 95809
(916) 445-1888

STATE OF CALIFORNIA

NEW CAR DEALERS POLICY AND APPEALS BOARD

In the Matter of WEBER AND COOPER LINCOLN-MERCURY, A California Corporation, Appellant, v. DEPARTMENT OF MOTOR VEHICLES, Respondent.	Appeal No. A-20-71 Filed: August 15, 1972

Time and Place of Hearing:	July 19, 1972, 9:00 a.m. City Council Chambers City Hall 625 E. Santa Clara Street Ventura, California
For Appellant:	DeWitt Blase Heily, Blase, Ellison & Muegenburg 220 South A Street Oxnard, CA 93030
For Respondent:	Honorable Evelle J. Younger Attorney General By: Jeffrey S. Wohlner Deputy Attorney General

FINAL ORDER

An appeal was taken to this board by Weber and Cooper Lincoln-Mercury, hereinafter referred to as "appellant",

from a decision of the Director of Motor Vehicles imposing a 10-day suspension, stayed for a period of one year, during which time appellant would be on probation and subject to the condition that it obey all laws and regulations governing commerce in motor vehicles. Proceeding via the Administrative Procedure Act (Section 11500 et seq. Government Code), the director found that appellant had: (1) overcharged customers registration and vehicle license fees in six instances; (2) failed in one instance to have a salesman's license properly displayed; (3) advertised motor vehicles without including in the advertisement the license number or vehicle identification number; and (4) advertised prices of motor vehicles that excluded freight costs.

In mitigation, the director found that appellant had: (1) refunded all of the overcharges and imposed more effective controls to avoid repetition of such violations; (2) desisted from placing advertisements of the type found to be in violation of the law immediately after being advised of their illegality; and (3) been very cooperative in all respects with investigators of the Department of Motor Vehicles.

Appellant not only contends that the penalty imposed by the director is excessive, but also maintains that some of the findings are not supported by the evidence. We dispose

of the evidentiary questions first and then direct our attention to the appropriateness of the penalty.

At the outset, we reject the assertion of the department's counsel on appeal that the board is bound by the substantial evidence rule. In Holiday Ford v. Department of Motor Vehicles, A-1-69, we said: "We are persuaded that Section 3054 Vehicle Code compels the application of the independent judgment rule rather than the substantial evidence rule." Pursuant to this rule, we are called upon to resolve conflicts in the evidence in our own minds, draw such inferences as we believe to be reasonable and make our own determinations regarding the credibility of witnesses whose testimony appears in the transcript of the administrative proceedings.

IS THE DIRECTOR'S FINDING THAT APPELLANT VIOLATED SECTION 11713(h) VEHICLE CODE BY NOT HAVING DISPLAYED AT THE DEALERSHIP A LICENSE AUTHORIZING A SALESMAN TO SELL MOTOR VEHICLES SUPPORTED BY THE WEIGHT OF THE EVIDENCE?

Appellant was charged with hiring one Almquist during 1969 as a vehicle salesman when Almquist was not licensed as such. Appellant was also charged with not having Almquist's license displayed at appellant's premises. However, the director found, "It was not established that said Steven Joseph Almquist was not then licensed as a vehicle salesman." The director did find that no license authorizing Almquist to act as a vehicle salesman was displayed at appellant's premises during the period

of employment but that a "suspense receipt" issued to Almquist was displayed.

The department produced no evidence that Almquist's license was not properly posted but apparently assumed that, because it believed that Almquist was not licensed, it necessarily followed that his license would not be posted on the premises. In view of its apparent inability to meet its burden of proof, a similar finding should have, in our opinion, been made concerning the posting of the license when it was found that there was insufficient evidence to support the charge that Almquist was not licensed.

The department apparently based the "no posting" finding on the fact that a suspense receipt issued to Almquist was posted on appellant's premises. While a finding may be based upon an inference (People v. Berti, 178 Cal.App.2d 872; Bauman v. Harrison, 46 Cal.App.2d 84), an inference must be reasonably and logically drawn and may not be based only on imagination, speculation, supposition, surmise, conjecture or guesswork. (Cothran v. Town Council of Los Gatos, 209 Cal.App. 2d 645.) We believe it to be no more than speculation or guesswork to find from the facts before us that a vehicle salesman's license issued to Almquist was not posted on appellant's premises.

We reverse that portion of Finding of Fact V of the director's decision which finds that Almquist's license was not displayed on appellant's premises during Almquist's period of employment and we reverse in its entirety Determination of Issues II.

IS THE DIRECTOR'S FINDING THAT APPELLANT VIOLATED SECTION 11713(a) VEHICLE CODE AS IMPLEMENTED BY 13 CAL. ADM. CODE 432.01 BY USING STOCK NUMBERS TO IDENTIFY VEHICLES IN ADVERTISEMENTS SUPPORTED BY THE WEIGHT OF THE EVIDENCE?

The director found that appellant had advertised motor vehicles for sale in a newspaper and identified the vehicles by stock numbers rather than license numbers or vehicle identification numbers. Appellant does not attack the finding. The director further found that appellant believed, at the time the advertisements were published, that stock numbers satisfied the requirements of the law.

We do not believe that the manner in which appellant used stock numbers in advertisements to identify vehicles constituted misleading or inaccurate advertising as those terms were used in Section 11713(a) Vehicle Code at the time the publications occurred.[1/] In each of the advertisements bearing a stock number, the vehicles were described by make, year and manufacturer's

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1/ At the relevant time, Section 11713(a) read as follows:

"11713. It shall be unlawful and a violation of this code for the holder of any license issued under this article:

"(a) To intentionally publish or circulate any advertising which is misleading or inaccurate in any material particular."

model and some physical characteristics of each vehicle were given. The stock number was clearly legible in the advertisements.

To run afoul of Section 11713(a) Vehicle Code, an advertisement must have been either "misleading" or "inaccurate". Turning to Webster's New International Dictionary -- Second Edition -- Unabridged for edification as to the meanings of the crucial words, we find the word "mislead" defined as, "1. To lead into a wrong way or path; to lead astray; to cause to err; to deceive." The word "accurate" is defined as, "1. In exact or careful conformity to truth or to some standard of requirement, esp. as the result of care; free from failure, error or defects; exact as accurate calculator; accurate knowledge." "Inaccurate" is defined as, "Not accurate; inexact: hence, incorrect; erroneous."

We do not perceive how, under these circumstances, the prospective purchaser of an automobile could be misled or in any way led astray or deceived. There is no contention made by the department and certainly the administrative record provides no basis for a contention that appellant switched stock numbers for the purpose of confusing buyers. There is likewise no contention and no basis for a contention that the stock numbers were inaccurate. Thus, it clearly appears to us that a prospective customer would have no difficulty in

identifying at the dealer's premises the vehicles described in the advertisements.

Neither do we believe that appellant's advertisements ran afoul of 13 Cal.Adm. Code 432.01.[2/] The purpose of that regulation, which was adopted by the Director of Motor Vehicles to implement Section 11713(a) Vehicle Code, is stated in the text of the regulation itself: "...so that a prospective purchaser may recognize it as the vehicle advertised for sale." We view that phraseology as qualifying the requirement of the regulation that an advertisement must contain either the vehicle's identification number or license number. In other words, if the advertisement reasonably permits a prospective purchaser to identify the advertised vehicle through means other than the use of a license number or an identification number, such advertisement does not conflict with Regulation 432.01. As we previously stated, we have no doubt that a prospective purchaser could reasonably identify any of the vehicles in the advertisements complained of by the department.

We find that the weight of the evidence does not support

2/ "432.01. Identity of Vehicle. Any specific vehicle advertised for sale by a dealer shall be identified by either its vehicle identification number or license number so that a prospective purchaser may recognize it as the vehicle advertised for sale."

the finding that appellant violated Section 11713(a) Vehicle Code and 13 Cal.Adm. Code 432.01 and, accordingly, we reverse the Director's Determination of Issues III.

DOES THE WEIGHT OF THE EVIDENCE SUPPORT THE FINDING THAT APPELLANT VIOLATED SECTION 11713(a) and 13 CAL.ADM. CODE 433.00 BY ADVERTISING THE COST OF VEHICLES WHEN SUCH COST SPECIFICALLY EXCLUDED THE COST OF FREIGHT FROM THE ADVERTISED COST OF THE VEHICLE?

On October 2, 1970, and October 9, 1970, appellant caused to be published advertisements in a newspaper wherein certain vehicles at a certain price "plus tax, freight and license" were advertised. The quoted language was in the immediate proximity of the dollar figure and was of sufficient size type to be readily legible.

The department believes that the advertising of a price which does not include freight costs is misleading or inaccurate, as those terms were used in Section 11713(a) Vehicle Code at the time the advertisements were published, notwithstanding the fact the advertisement clearly shows that freight costs, among others, are extra.

Appellant argues that there was no evidence introduced at the administrative hearing which would indicate that the advertisements were misleading. Further, appellant points out that manufacturers of automobiles advertise on a national scale showing a dollar figure for the vehicle "plus destination

charges". He argues that this is merely another way of saying "plus freight". We dismiss the latter argument on the grounds that the relevant statute is controlling rather than the conduct of manufacturers.

We believe the question before us must be answered in the negative because the evidence fails to show that the advertisements are misleading or inaccurate. The advertisements show that the cost of fees and taxes due the state and the cost of freighting must be added to the price of the vehicle to arrive at the total cost. Certainly this does not lead astray, cause to err or deceive. This is not a situation where the word "freight" is of a size type smaller than the surrounding words nor is the word "freight" obscured in a remote part of the advertisement. Further, there is nothing on the face of the advertisement or in the administrative record to suggest that the advertising was not accurate or was incorrect or erroneous.

Because we hold that the advertisements in question do not violate the relevant statute, it follows that we find that they also do not run afoul of the implementing regulation, 13 Cal. Adm. Code 433.00. Regulations can only "...implement, interpret or make specific the law enforced or administered..." (Sections 11371 and 11374 Government Code); they may not alter or enlarge the terms of a legislative enactment. (Whitcomb Hotel v.

California Employment Commission, 24 Cal.2d 753; Morris v. Williams, 67 Cal.2d 733.)

The Director's Determination of Issues IV is hereby reversed on the grounds that the weight of the evidence does not support a finding that the advertisements violated Section 11713(a) Vehicle Code and 13 Cal.Adm. Code 433.00.

PENALTY

In determining the appropriate penalty to be imposed in this case, we have for our consideration only the six instances of overcharging for registration and vehicle license fees. The facts are undisputed. The excess fees ranged from $1 to $13 for a total of $34. The director found that refunds were promptly made in each instance following discovery of an overcharge and that appellant had instituted effective controls to avoid repetition of such violations in the future.

With reference to the finding that appellant made refunds promptly in each of the six instances, it is significant that refunds were not made in those instances, according to appellant's president, until after appellant had been served with the accusation. (A.T. 95:5-8.)[3/] The six purchases occurred during

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3/ "A.T." refers to the transcript of the proceedings before an officer of the Office of Administrative Hearings. The numbers refer to the corresponding page and line numbers in the transcript.

a period from August 4, 1969, to February 21, 1970, and the accusation was filed February 10, 1971. Under these circumstances, we find it difficult to find the element of promptness. We believe it reasonable to infer that appellant's accounting procedures were so haphazard or ill-supervised that no reimbursements would have been forthcoming in the six instances had appellant not come under the scrutiny of the enforcement authority.

Pursuant to Sections 3054(f) and 3055 Vehicle Code, the New Car Dealers Policy and Appeals Board amends the decision of the Director of Motor Vehicles as follows:

WHEREFORE, THE FOLLOWING ORDER is hereby made:

The dealer's license, certificate and special plates (D-6200) heretofore issued to appellant, Weber and Cooper Lincoln-Mercury, a California corporation, is hereby suspended for a period of three (3) days; provided, however, execution of said order of suspension is hereby stayed and appellant placed on probation for a period of thirty (30) days under the following terms and conditions:

1. Appellant shall strictly comply with all provisions of the Vehicle Code and the regulations of the Department of Motor Vehicles governing the sales and transfers of motor vehicles in the State of California.

If and in the event the Director of Motor Vehicles should

determine, after giving appellant notice and opportunity to be heard, that a violation of probation has occurred, the director may terminate the stay and impose suspension or otherwise modify the order. In the event appellant faithfully keeps the terms of the condition imposed for the period of thirty (30) days, the stay shall become permanent and appellant shall be restored to all license privileges.

This Final Order shall become effective August 28, 1972.

AUDREY B. JONES

ROBERT B. KUTZ

GILBERT D. ASHCOM

PASCAL B. DILDAY

JOHN ONESIAN

WINFIELD J. TUTTLE

A-20-72

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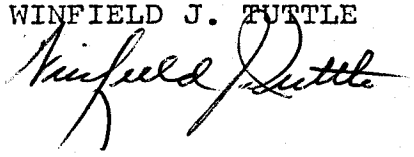

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